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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 173.

EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY, THE NORFOLK AND WESTERN RAILROAD COMPANY, ET AL., APPELLANTS,

vs.

THE INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED JANUARY 9, 1911.

(17,995.)

(17,595.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 481.

THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY, THE NORFOLK AND WESTERN RAILROAD COMPANY, ET AL., APPELLANTS,

vs.

THE INTERSTATE COMMERCE COMMISSION.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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1 *Transcript of Record.*

Be it remembered, that at a circuit court of the United States, begun and held for the southern division of the eastern district of Tennessee, at the Federal building in the city of Chattanooga, within said district and the sixth circuit, on the first Monday, it being the 4th day of October, A. D. 1897.

Court met pursuant to adjournment—present and presiding, the Honorable Chas. D. Clark, district judge for the eastern and middle district of Tennessee—among the proceedings had were the following, to wit:

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILway Company, The Norfolk and Western Railroad Company, The Old Dominion Steamship Company, The Western and Atlantic Railroad Company, The Central Railroad and Banking Company of Georgia, The Central Railroad Company, The Georgia Railroad Company, The Ocean Steamship Company of Savannah, The South Carolina Railway Company, The Clyde Steamship Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, The Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, The Nashville, Chattanooga and St. Louis Railway Company, The Pennsylvania Railroad Company, The Pennsylvania Company, The New York, Lake Erie and Western
2 Railroad Company, The New York and New England Railroad Company, The Delaware and Hudson Canal Company. } No. 384.

Be it remembered that heretofore, to wit: on the 24th day of March, A. D. 1893, came the petitioner and filed in the clerk's office of said court, a certain petition, which said petition is clothed in the words and figures following, to wit:

Petition of the Interstate Commerce Commission.

(Endorsed:) Filed 1893, Mar. 24. Henry O. Ewing, deputy clerk.

In the Circuit Court of the United States for the Eastern District of Tennessee. In Equity.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILway Company, The Norfolk and Western Railroad Company, The Old Dominion Steamship Company, The Western and Atlantic Railroad Company, The Central Railroad and Banking Company of Georgia, The Georgia Railroad Company, The Ocean Steamship Company of Savannah, The South Carolina Railway Company, The Clyde Steamship Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, The Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, The Nashville, Chattanooga and St. Louis Railway Company, The Pennsylvania Railroad Company, The Pennsylvania Company, The New York, Lake Erie and Western Railroad Company, The New York and New England Railroad Company, The Delaware and Hudson Canal Company. } No. —.

3 To the circuit court of the United States, sitting in equity, within and for the eastern district of Tennessee, at Chattanooga:

Your petitioner, The Interstate Commerce Commission, which was created and established and now exists under and by virtue of an act of the Congress of the United States entitled "An act to regulate commerce," approved February 4, 1887, as amended by an act approved March 2, 1889, and as amended by an act approved February 10, 1891, and an act approved February 11, 1893, humbly complaining, showeth unto your honors that the East Tennessee, Virginia and Georgia Railway Company is a corporation created, chartered, and existing under and by virtue of the laws of the State of Tennessee, and having its principal office at Knoxville, in said State; that the Norfolk and Western Railroad Company is a corporation created, chartered, and existing under and by virtue of the laws of the States of Virginia and West Virginia, and having its principal offices at Roanoke, Va.; that the Old Dominion Steamship Company is a corporation created, chartered, and existing under and by virtue of the laws of the State of ——, and having its principal office at ——, in the State of ——; that the Western and Atlantic Railroad Company is a corporation created, chartered, existing under and by virtue of the laws of the State of Georgia, and having its principal office at Atlanta, in the State of Georgia; that the

Central Railroad and Banking Company of Georgia is a corporation created, chartered, and existing under and by virtue of the laws of the State of Georgia, and having its principal office at Atlanta, in the State of Georgia; that the Georgia Railroad Company is a corporation created, chartered, and existing under and by virtue of the laws of the State of Georgia, and having its principal office at Augusta, in said State; that the Ocean Steamship Company of Savannah is a corporation created, chartered, and existing under and by virtue of the laws of the State of Georgia, and having its principal office at Savannah, in said State; that the South Carolina Railway Company is a corporation created, chartered, and existing under and by virtue of the laws of the State of South Carolina, and having its principal office at Charleston, in said State; that the Clyde Steamship Company is a corporation created, chartered, and existing under and by virtue of the laws of the State of South
4 Carolina, and having its principal office at Charleston, in the State of South Carolina; that the Cincinnati, New Orleans and Texas Pacific Railway Company is a corporation created, chartered, and existing under and by virtue of the laws of the State of Ohio, and having its principal office at Cincinnati, in said State; that the Baltimore and Ohio Railroad Company is a corporation created, chartered, and existing under and by virtue of the laws of the State of Maryland, and having its principal office at Baltimore, in said State; that the Central Railroad Company of New Jersey is a corporation created, chartered, and existing under and by virtue of the laws of the State of New Jersey, and having its principal office at New York, in the State of New York; that the Nashville, Chattanooga and St. Louis Railway Company is a corporation, created, chartered, and existing under and by virtue of the laws of the States of Tennessee, Alabama, Georgia, and Kentucky, and having its principal office at Nashville, in the State of Tennessee; that the Pennsylvania Railroad Company is a corporation, created, chartered, and existing under and by virtue of the laws of the State of Pennsylvania, and having its principal office at Philadelphia, in said State; that the Pennsylvania Company is a corporation, created, chartered, and existing under and by virtue of the laws of the State of Pennsylvania, and having its principal office at Pittsburg, in said State; that the New York, Lake Erie and Western Railroad Company is a corporation, created, chartered, and existing under and by virtue of the laws of the State of New York, and having its principal office at New York, in said State; that the New York and New England Railroad Company is a corporation, created, chartered, and existing under and by virtue of the laws of the States of Massachusetts, Connecticut, Rhode Island, and New York, and having its principal office at Boston, in the State of Massachusetts; that the Delaware and Hudson Canal Company is a corporation created, chartered, and existing under and by virtue of the laws of the State of New York, and having its principal office at New York, in said State.

That the said defendants at the time of the committing of the grievances hereinafter specially mentioned were and still are common carriers engaged in the transportation of persons and property partly

by railroad and partly by water, under a common control, management, or arrangement for a continuous carriage or shipment by their railroads and lines of steamboats extending through several of the United States, and particularly were they then engaged in such business between seaboard points in the States of Massachusetts, New York, Pennsylvania, and Maryland to points in the State of Tennessee, and as such common carriers were during all the time aforesaid and still are subject to the said act entitled "An act to regulate commerce," and the amendments thereto.

That the said defendants were heretofore, to wit, on th- 9th day of April, 1890, duly impleaded in a controversy not requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, before the said Interstate Commerce Commission, upon the petition of the board of trade of Chattanooga, then being a mercantile society, duly incorporated under the laws of the State of Tennessee, and having its principal office at Chattanooga, in that State, for the alleged violation on the part of said defendants of the provisions of said act, as at large and more fully appears in and by the said petition on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit A; that a copy of said petition, duly attested by the secretary of the said Interstate Commerce Commission, under the seal of said commission, was duly forwarded by the said Interstate Commerce Co[illegible]mission to each of the defendants aforesaid, as required by the th[illegible]th section of the said act.

That thereafterwards, on the 5th day of May, 1890, the sa.. Georgia Railroad Company filed its answer to the above-named petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed as a part of this petition, the same being marked Exhibit B.

That thereafterwards, to wit, on the 8th day of May, 1890, the East Tennessee, Virginia and Georgia Railway Company and the Norfolk and Western Railroad Company filed their joint answer to the above-named petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed as a part of this petition, the same being marked Exhibit C.

That thereafterwards, to wit, on the 9th day of May, 1890, the Baltimore and Ohio Railroad Company filed its answer to the above-named petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed as a part of this petition, the same being marked Exhibit D.

That thereafterwards, to wit, on the 15th day of May, 1890,
6 the Central Railroad and Banking Company of Georgia and the Ocean Steamship Company of Savannah filed their joint answer to the above-named petition, as at large and more fully appears in and by said answer on file in the office of the said commis-

sion, a copy whereof is hereunto annexed as a part of this petition, the same being marked Exhibit E.

That thereafterwards, on the 19th day of May, 1890, the Norfolk and Western Railroad Company filed a further and separate answer to the above-named petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed as a part of this petition, the same being marked Exhibit F.

That thereafterwards, on the 19th day of May, 1890, the Western and Atlantic Railroad Company filed its answer to the above-named petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed as a part of this petition, the same being marked Exhibit G.

That thereafterwards, on the 20th day of May, 1880, the Delaware and Hudson Canal Company filed its answer to the above-named petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed as a part of this petition, the same being marked Exhibit H.

That thereafterwards, on the 20th day of May, 1890, the Pennsylvania Railroad Company filed its answer to the above-named petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed as a part of this petition, the same being marked Exhibit I.

That thereafterwards, on the 23d day of May, 1890, the Nashville, Chattanooga and St. Louis Railway Company filed its answer to the above-named petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed as a part of this petition, the same being marked Exhibit K.

That thereafterwards, on the 27th day of May, 1890, the New York, Lake Erie and Western Railroad Company filed its answer to the above-named petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed as a part of this petition, the same being marked Exhibit L.

7 That thereafterwards, on the 9th day of June, 1890, the Cincinnati, New Orleans and Texas Pacific Railway Company filed its answer to the above-named petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed as a part of this petition, the same being marked Exhibit M.

That thereafterwards, on the 11th day of June, 1890, the New York and New England Railroad Company filed its answer to the above-named petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed as a part of this petition, the same being marked Exhibit N.

That thereafterwards, on the 12th day of June, 1890, D. H. Cham-

berlain, receiver of the South Carolina Railway Company, filed his answer to the above-named petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed as a part of this petition, the same being marked Exhibit O.

That thereafterwards, on the 20th day of June, 1890, the Central Railroad Company of New Jersey filed its answer to the above-named petition, as at large and more fully appears in and by said answer on file in the office of the said commission, a copy whereof is hereunto annexed as a part of this petition, the same being marked Exhibit P.

That thereafterwards, the said cause being at issue upon the pleadings aforesaid duly came on for investigation and hearing before the said Interstate Commerce Commission, duly and legally assembled for that purpose, on the 12th day of November, 1890, at Chattanooga aforesaid, and days subsequent thereto, when said complainant duly appeared as well as the following-named defendants: The East Tennessee, Virginia and Georgia Railway Company; The Norfolk & Western Railroad Company; The Old Dominion Steamship Company; The Western and Atlantic Railroad Company; The Central Railroad and Banking Company of Georgia; The Ocean Steamship Company of Savannah; The Cincinnati, New Orleans and Texas Pacific Railway Company; The Nashville, Chattanooga and St. Louis Railway Company; all of the other defendants having theretofore been duly and seasonably notified that the hearing in said cause would be had at Chattanooga aforesaid, on that date, and thereupon the said cause proceeded to hearing and determination.

That at the said hearing it was made to appear to the satisfaction of the said commission that the said defendants had violated
8 the provisions of the said act in certain respects as was said to have been violated by them in the said petition hereinbefore referred to, marked Exhibit A, and thereupon, on the 30th day of December, 1892, the said commission duly and legally determined the matters and things in controversy and at issue between the said parties, and made a report in writing in respect thereof, which included the findings of fact upon which the conclusions of the said commission were based, as at large and more fully appears in and by the report of the determination of the said commission, on file in the office of the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit Q.

That thereafterwards, to wit, on the 30th day of December, A. D. 1892, upon the determination of the said cause as aforesaid, the said commission duly formulated an order and notice in relation to the matters and things stated and charged in the said petition, based upon the findings and determination of the said commission with respect thereto, agreeably to the requirements of the statute in such case made and provided, which said order now remains in full force and effect, never having been vacated, set aside, altered, modified, or changed in any respect whatever, and is now on file in the office of

the said commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit R.

That thereafterwards, to wit, on the 13th day of January, 1893, the said commission, agreeably to the provisions of the law in that regard, duly caused a properly authenticated copy of its said report in respect thereto as aforesaid, together with the order and notice aforesaid, to be delivered to the said defendants.

And thereupon the petitioner shows that it has not been made to appear to the said commission that the said defendants have ceased and desisted from the violations of law set forth in the said report and order of the said commission, but, on the contrary thereof, the said defendants, unmindful of their duty and of the decision and determination of the said commission, as stated in its report as aforesaid, have, through their officers, servants, and attorneys, wholly disregarded and set at naught the authority and order of the said commission in that regard, and have wilfully and knowingly violated and disobeyed the said order, and have from the time of the issuance and service of the said order and notice as hereinbefore set forth, hitherto wholly neglected and refused,
9 and still do neglect and refuse, to comply with the same, to wit, at Chattanooga aforesaid, in this that the said defendants not having prior to the 1st day of February, 1893, made application to the said commission for relief under the proviso clause of the fourth section of the act to regulate commerce, have not since the 1st day of Feb'y, 1893, ceased and desisted from making, enforcing, or receiving any higher rates for the transportation of property from Boston, in the State of Massachusetts; New York, in the State of New York; Philadelphia, in the State of Pennsylvania; Baltimore, in the State of Maryland; and other eastern seaboard points to Chattanooga aforesaid, than have been made and accepted by them at the same time for like transportation to Nashville, in the State of Tennessee.

Wherefore the petitioner prays—

1. That a subpœna or other suitable process may issue according to the course of equity, requiring the said The East Tennessee, Virginia and Georgia Railway Company, The Norfolk and Western Railroad Company, The Old Dominion Steamship Company, The Western and Atlantic Railroad Company, The Central Railroad and Banking Company of Georgia, The Georgia Railroad Company, The Ocean Steamship Company of Savannah, The South Carolina Railway Company, The Clyde Steamship Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, The Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, The Nashville, Chattanooga and St. Louis Railway Company, The Pennsylvania Railroad Company, The Pennsylvania Company, The New York, Lake Erie and Western Railroad Company, The New York and New England Railroad Company, and The Delaware and Hudson Canal Company to appear at such time and place as this honorable court may determine, then and there to make full, complete and perfect answer to all the matters and things hereinabove stated and charged, as fully and particularly as

if the said companies were specifically and specially interrogated in regard thereto without verifying said answers by oath, which said verified answers are hereby specially waived.

2. That upon the filing of this petition an order may be passed by this honorable court directing the method of service of notice of the pendency of this proceeding.

3. That such order or orders may be passed pending the cause as will secure a speedy hearing and determination of the matters and things stated and charged in the foregoing petition.

10 4. That such order or orders may be passed pending the cause as may be necessary for the prosecution of all such inquiries as the court may think needful and lawful to enable it to form a just judgment of the matters and things stated and charged in the foregoing petition.

5. That an order may be entered pending the cause granting to the petitioner a writ of injunction or other proper process, mandatory or otherwise, to restrain the said defendants, their officers, servants and attorneys, from further continuing in their violations of and disobedience to the said order of the said commission, and that upon final hearing such injunction may be made perpetual.

6. That a decree may be entered, if it shall seem meet to this honorable court, requiring the said defendants to pay a sum of money, not exceeding the sum of $500, for every day after a day to be named in said decree that it shall fail to obey the said injunction or other proper process.

7. For such other and further relief in the premises as to the court may seem meet and the equities of the petitioner's cause may require.

[L. S.] THE INTERSTATE COMMERCE COMMISSION,
By EDW. A. MOSELEY,
The Secretary Thereof, Thereunto Duly Authorized.

This is the first application for the writ of injunction in this cause.

H. M. Wiltse, ass't U. S. att'y for the eastern district of Tennessee, being duly sworn, deposes and says that the statements made in the foregoing petition are true to the best of his knowledge, information and belief.

H. M. WILTSE.

Subscribed and sworn to before me this 24 day of Mar., 1893.

HENRY O. EWING,
Deputy Clerk.

11 EXHIBIT A.

The Interstate Commerce Commission.

THE BOARD OF TRADE OF CHATTANOOGA
vs.
THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY, THE Norfolk and Western Railroad, The Old Dominion Steamship Company, The Western and Atlantic Railway Company, The Central R. R. & Banking Company of Georgia, The Georgia Railroad, The Ocean Steamship Company of Savannah, The South Carolina Railway, The Clyde Steamship Company, The Cin., New Orleans & Texas Pacific Railway, The Baltimore & Ohio Railroad Company, The Central Railroad of New Jersey, The Nashville, Chattanooga & St. Louis Railway, The Pennsylvania Railroad Company, The Pennsylvania Company, The New York, Lake Erie & Western Railroad, The New York & New England Railroad, The Delaware & Hudson Canal Company.

The petition of the Board of Trade of Chattanooga respectfully shows:

I. That the said board of trade is an association of the merchants and manufacturers of the city of Chattanooga, in the State of Tennessee, and is chartered under the laws of said State; that it has a president and secretary and a board of directors; that its objects, among others, are "to study the workings of our system of transportation, upon which our commercial prosperity depends so largely, and endeavor to remedy, by all proper means, the defects and abuses existing therein."

II. That the defendants above enumerated are common carriers engaged in the transportation of passengers and property by railroad and water from seaboard points in the State of Massachusetts, New York, Pennsylvania, and Maryland to points in the State of Tennessee, and as such common carriers are subject to the act to regulate commerce.

12 III. That the defendants separately and jointly have been and are now transporting property and participating in through rates of freight charges for transporting the same, from the following points, which are designated as eastern seaboard points: Boston, in the State of Massachusetts; New York in the State of New York; Philadelphia, in the State of Pennsylvania; Baltimore, in the State of Maryland; to the following points in the State of Tennessee: Nashville, Memphis, and Chattanooga, cities that compete for business in the same territory. That the defendants are transporting said property and participating in through rates for the transporting of the same, that are much lower to Nashville and Memphis than the said defendants charge and collect for transporting like property from the aforesaid seaboard points under the same, or substantially the same, circumstances and conditions to the city of Chattanooga.

IV. That the said defendants, being common carriers, transport property shipped at eastern seaboard points to the points in the State of Tennessee enumerated in paragraph 3, and transport it through the city of Chattanooga to the cities of Nashville and Memphis, which cities are respectively 151 miles and 310 miles beyond Chattanooga, and therefore that many miles farther from the said eastern seaboard points.

V. That said defendants refuse to transport said like property, as aforesaid, to the city of Chattanooga at the same rates as they transport like property from said eastern seaboard points to the city of Memphis, which is 310 miles longer haul, or at the rates at which they transport like property from said eastern seaboard points to Nashville, which is a 151-mile longer haul than the haul to Chattanooga; although they transport the property, as aforesaid, through the city of Chattanooga. And this in violation of section four of the act to regulate commerce.

VI. That the rates charged to Chattanooga are too high, both in comparison with the rates given Nashville and Memphis and in themselves. That they should be reduced because of Chattanooga's position as regards nearness to the said eastern seaboard points; and because of its railway facilities; and because of its water communications, which will be complete the coming summer.

VII. That the transportation of property from eastern seaboard points at lower rates to Nashville and Memphis than to Chattanooga, by the defendants, is not only a violation of section 4 of the
13 act to regulate commerce, but the rates so charged and collected are in violation of section 2. They unjustly discriminate against the merchants of Chattanooga and in favor of the merchants of Nashville and Memphis. They are also in violation of section 3, which forbids unreasonable preference to be given to any locality. In the instances complained of the preference given Nashville and Memphis amount-, in many particulars, to a reasonable profit to the favored merchants and manufacturers.

VIII. That the rates as aforesaid are also violations of section 1, and are admitted to be violations by the defendants when they persistently solicit in eastern seaboard points the property for transportation to Nashville and Memphis at much lower rates than they charge for transporting like property from said points to the city of Chattanooga. If the rates to Nashville and Memphis afford sufficient compensation to warrant said defendants in incurring large expense in soliciting said property for Nashville and Memphis, then said defendants would receive sufficient compensation in the same rates for transporting like property to Chattanooga.

IX. That the technical claim of the defendants that the rates to Nashville and to Memphis are not made through Chattanooga does not avail to warrant the violation of section 4 of the act to regulate commerce, because the defendants are not forced, nor compelled, to transport such property at the rates made to those points. The defendants are separate corporations, and are merely united in the through-freight lines, with through rates of freight charges. And, further, that the rates to either Nashville or Memphis would be

ample compensation to said freight lines for the transportation of property from eastern seaboard points to the city of Chattanooga.

X. That the existence of water transportation for a portion of the way to Nashville, and for a portion or for the whole of the way to Memphis does not warrant, force or compel the defendants to transport property from eastern seaboard points to Nashville and Memphis at lower rates of freight than said defendants can, and may, transport like property to Chattanooga. That the water may tend to keep the rates down to reasonable levels your petitioners admit, but the defendants do not use the water rates, but such rates as give them ample compensation.

XI. That the opening of the Muscle Shoals canal, which the United States Army engineer in charge, Col. J. W. Barlow, assures us will occur in the early part of the coming summer, will
14 give Chattanooga water transportation from Cincinnati, such as Nashville now enjoys, and will, and should, under all previous rulings, cause like reductions as were made to other points because of water transportation to be made in the rates to Chattanooga. That if the rates which must follow the opening of the canal shall be fair, just, and equitable the same rates would be fair, just, and equitable today, because there will be no lessening of the expenses of the said defendants in the transportation of said property from eastern seaboard points by the opening of said canal. Said defendants therefore charge the present unreasonable rates to Chattanooga just because they can, and not because such rates are fair, just, or absolutely necessary. The maintaining of such rates is arbitrary, and from such arbitrariness your petitioners humbly pray for relief.

XII. Your petitioners respectfully refer to the tariffs on file in the office of the interstate commission for proof of the foregoing allegations. And they ask permission to illustrate said tariffs, as follows:

Rates from New York and Boston—

	Classes—					
	1	2	3	4	5	6
To Chattanooga.....	114	98	86	73	60	49
To Memphis, 310 miles farther.....	100	85	65	45	38	35
To Nashville, 151 miles farther.....	91	78	60	42	36	31

These figures illustrate the arbitrariness of the rate-making and the violations of section 4 of the act to regulate commerce.

Your petitioners would further ask permission to illustrate the discriminations of the rates now in force:

Rates from Boston and New York are less—

	1	2	3	4	5	6
To Nashville than to Chattanooga by...	23	20	26	31	24	18
To Memphis than to Chattanooga by....	14	13	21	28	22	14

An examination of these figures will convince the honorable commission that the rates complained of are made by no certain rules, and are oppressively arbitrary.

Your petitioners would further ask permission to give the rates in force to the city of Cincinnati, a basing point on the Ohio river, where the water transportation to Nashville begins:

15 The rates from Boston and New York—

	1	2	3	4	5	6
To Cincinnati.....	65	57	44	30	26	22

From Cincinnati—

	1	2	3	4	5	6
To Chattanooga, 335 miles	49	41	42	43	34	27
To Nashville, 296 miles.....	26	21	16	12	10	9

These figures are the difference between the rates to Cincinnati from the East and the rates to Chattanooga and Nashville from the East. The difference in the mileage from Cincinnati to Nashville and to Chattanooga is only 39 miles in favor of Nashville, while the charges for the haul of the 39 miles extra costs the merchants of Chattanooga fully double on the average of all the classes what the haul of 296 miles costs the merchants of Nashville. No doubt the defendants prorate these differences over the entire lines from eastern points to Chattanooga, still the fact remains.

XIII. Your petitioners respectfully ask that the honorable commission inquire into these arbitrary discriminations, and that opportunity be given your petitioners to make good any and all allegations herein made, and be permitted to amend this complaint, if through ignorance any material point or claim is omitted, so that the honorable commission may be able to make such order as will be just, fair, and equitable, both to your petitioners and to the defendants.

Wherefore the petitioners pray that the defendants may be required to answer the charges herein, and that after due notice and hearing and investigation an order be made commanding the defendants to cease and desist from said violations of the act to regulate commerce; and that said order require them to transport property to Chattanooga from eastern seaboard points at such rates as the honorable commission may decide to be just and equitable; and further, that said order command them to cease transporting property from eastern seaboard points to the cities of Nashville and Memphis at lower rates of freight charges than the said defendants charge and collect for transporting like property to the city of Chattanooga, and for such other and further order as the commission may deem necessary to grant relief to the merchants and manufacturers of Chattanooga.

16 In the name of and by direction of the board of trade in special session called for this business on the 14th day of March, 1890.

JOSEPH F. SHIPP, *President.*

G. C. CONNOR, *Secretary.*

STATE OF TENNESSEE, }
Hamilton County. }

Personally appeared before me, J. P. Hoskins, a notary public in and for said county, Joseph F. Shipp, president of the Chattanooga Board of Trade, who, being duly sworn, says that the said board is the complainant in this proceeding, and that the said matters set forth in the foregoing petition are true, as he verily believes.

J. P. HOSKINS,
Notary Public.

Subscribed and sworn to before me this 3d day of April, 1890.

[SEAL.] J. P. HOSKINS,
Notary Public.

EXHIBIT B.

PETITION OF THE BOARD OF TRADE OF CHATTANOOGA }
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY and Others. }

Answer of the Georgia Railroad Company to the Above-stated Petition.

It is true that the rate from Boston and New York to Memphis and Nashville is less than to Chattanooga.

The existence of water transportation for a portion or for the whole of the way to Memphis and Nashville secures to those cities advantages not enjoyed by Chattanooga.

The Georgia railroad is but a link in the line from Boston and New York via Charleston, South Carolina, to Chattanooga, Memphis, and Nashville, and in participating in the transportation of freight from the eastern cities named to Memphis and Nashville at lower rates than to Chattanooga, the service is not performed under substantially similar circumstances and conditions, and consequently the rates are not violative of sections two, three, and four of the interstate-commerce act.

17 STATE OF GEORGIA, }
Richmond County. }

Before me, Wm. Lyon Martin, a notary public in and for said county, personally appeared John W. Green, who, on oath, says that he is the general manager of the Georgia railroad, and that the foregoing answer, so far as it is made of his own knowledge, is true, and so far as it is made on information and belief, he believes it to be true.

JNO. W. GREEN.

Subscribed and sworn to before me this 2nd day of May, 1890.

WM. LYON MARTIN,
Notary Public, Richmond County, Ga.

Exhibit C.

New York, N. Y., *May 6th*, 1890.

To the honorable Interstate Commerce Commission, Washington, D. C.:

The following-described railway lines, to wit, the East Tennessee, Virginia & Georgia railway, the Norfolk & Western railroad, common carriers and having a community of interest in the transportation of traffic between eastern seaboard cities of the United States and Chattanooga, Tenn., Memphis, Tenn., and Nashville, Tenn., respectfully make answer as herewith by the respective traffic officers of said companies signatories hereto, in conformity with law, to the complaint filed with your honorable body on April 19th, 1890, by the Board of Trade of Chattanooga, Tenn., as concerning an alleged discrimination in the adjustment of rates of transportation for freight between the cities of Boston, New York, Philadelphia, and Baltimore, and Chattanooga, Memphis, and Nashville, Tenn., reserving their right to make such further or more specific answer or argument in reference to each of the allegations made in said complaint that may seem proper to each of them, collectively or individually, whenever a hearing of said case may be ordered by your honorable body.

In answer to the charges contained or facts alleged in section 1, the respondents, jointly and severally, are willing to admit that the facts charged are true as stated.

In answer to the charges contained or facts alleged in section 2, of the complaint, the respondents admit the facts as charged.

18 In answer to the charges contained or facts alleged in section 3, the respondents admit that they have been and are now transporting property, and participating in through rates of freight charges for transporting the same, from the cities of Boston, New York, Philadelphia and Baltimore to the cities of Nashville, Memphis, and Chattanooga; but the respondents deny that the said cities of Nashville, Memphis and Chattanooga, compete for business in the same territory; and the respondents further deny that they are charging and collecting for transporting like property from said seaboard points to the city of Chattanooga higher rates under the same or substantially the same circumstances and conditions that they are charging and collecting for transporting like property to the cities of Memphis and Nashville.

In answer to the charges contained or facts alleged in section 4, the respondents admit that they do transport property shipped from the eastern seaboard points enumerated in section 3 to points in the State of Tennessee enumerated in said section, and transport it through the city of Chattanooga to the cities of Nashville and Memphis, and that said cities of Nashville and Memphis are respectively one hundred and fifty-one (151) and three hundred and ten (310) miles farther from said seaboard points than the city of Chattanooga.

In answer to the charges contained or facts alleged in section 5, the respondents admit the facts as charged, but they deny that their action in charging less rates for the longer haul to the cities of Memphis and Nashville is in violation of section 4 of the act to regulate commerce or any other provision of said act.

In answer to the charges contained or facts alleged in section 6, the respondents deny that the rates charged to Chattanooga are too high, or that they are unreasonable or unjust, or that they should be reduced by reason of any of the matters charged in said section 6 of said complaint.

In answer to the charges contained or facts alleged in section 7, the respondents deny that their action in charging lower rates to Nashville and Memphis than to Chattanooga in anywise violates either section 4 or section 2 of the act to regulate commerce. They deny that said rates unjustly discriminate against the merchants of Chattanooga and in favor of the merchants of Nashville and Memphis. They deny that said rates are in violation of section 3 of the act to regulate commerce, which forbids unreasonable preference to be given to any locality.

In answer to the charges contained or facts alleged in section 8, the respondents deny, in so far as the matters charged in said
19 section 8 may have any bearing upon questions raised by the complaint in this case, that they constitute a violation of section 1 of the act, or that the conclusions drawn therefrom afford sufficient evidence of what would be a reasonable compensation to the defendants for transporting property from the eastern seaboard points named to Chattanooga.

In answer to the charges contained or facts alleged in section 9, the respondents admit that the rates to Nashville and Memphis from the seaboard points mentioned in paragraph 3 of the complaint are not made through Chattanooga, but the respondents aver that this and other circumstances do justify them in charging less rates for a longer haul to Nashville and Memphis through Chattanooga from said eastern seaboard points via their line, than are charged to Chattanooga. The respondents deny that the rates to either Nashville or Memphis would be ample, just or proper compensation to them for the transportation of property from said eastern seaboard points to the city of Chattanooga.

In answer to the charges contained or facts alleged in section 10, the respondents deny the facts charged therein.

In answer to the charges contained or facts alleged in section 11, the respondents are advised and will insist that, whether or not the facts stated in said section may or may not be true, that they are wholly immaterial and irrelevant to the issue raised by the complaint.

In answer to the charges contained or facts alleged in section 12, the respondents do not admit that the rates from eastern seaboard points as set forth in said section are correctly stated, but they are content to refer to the tariffs on file with the commission, and to admit whatever may be shown by such records. The respondents deny that an inspection of such rates will in anywise substantiate

any of the conclusions set forth in any of the paragraphs of the complaint.

The respondents having fully answered, pray that said complaint may be dismissed and that they may be discharged with reasonable costs, etc.

EDWIN FITZGERALD,
Traffic Manager, East Tennessee, Virginia and Georgia Railway.

A. POPE,
General Freight Agent, Norfolk and Western Railroad.

Sworn to before me this seventh day of May, 1890.

E. JACKSON,
[SEAL.] *Notary Public, N. Y. Co.*

20 EXHIBIT D.

The Interstate Commerce Commission.

THE BOARD OF TRADE OF CHATTANOOGA
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY and Others.

Answer of the Baltimore and Ohio R. R. Co.

This defendant respectfully shows:

1. That this defendant makes through rates from the seaboard points named in the petition to Chattanooga, Memphis and Nashville, only under the tariffs, copies of which are herewith filed, marked "Defendant's Exhibit No. 1" showing the rates from New York, Philadelphia and Baltimore respectively to said points.

As will appear by the notation on said tariffs, freight for the points named is billed to Cincinnati at the tariff rate to Cincinnati under the official classification, and the remainder of the through rate is allowed as proportion south of the Ohio river. The said through rates are not made therefore under a joint prorating arrangement, but are made by adding to this defendant's regular tariff rate to Cincinnati the rates of the railroads south from that point.

This defendant has no part in determining the relative rates to Chattanooga, Memphis and Nashville respectively, and not being acquainted with the circumstances which determine the relative rates to those points, this defendant does not undertake to answer the allegations of the petition as to the unreasonableness of the differences between said rates. This defendant is in no way responsible for such differences, and takes no part in determining what those differences shall be.

Wherefore this defendant prays that the petition may be dismissed so far as concerns this defendant.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
By JOHN K. COWEN.
HUGH L. BOND, JR., *Counsel.*

STATE OF MARYLAND, } *To wit:*
City of Baltimore, }

May 8th, 1890, before me, the subscriber, a justice of the peace of the State of Maryland, in and for the city of Baltimore aforesaid, personally appeared Charles E. Ways, the general freight agent of the Baltimore and Ohio Railroad Company, and made oath in due form of law, that he is the general freight agent of the Baltimore and Ohio Railroad Company, and that he has read the foregoing answer, and that the matters and facts therein stated are true, as he verily believes.

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ROBERT A. THURSBY, *J. P.*

EXHIBIT E.

Before the Honorable Interstate Commerce Commission.

THE BOARD OF TRADE OF CHATTANOOGA
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD Company *et al.*

The joint and several answers of The Central Railroad and Banking Company of Georgia and The Ocean Steamship Company of Savannah respectfully shows:

1. These defendants admit that the facts alleged in section 1 of said complaint are true as therein stated.

2. They admit that they are common carriers engaged in the transportation of passengers and property by railroad and water from seaboard points in the States of Massachusetts, New York and Maryland to points in the State of Tennessee.

3. In answer to the 3d section of said complaint these defendants say that they admit that they have been and are now transporting property and participating in through rates of freight charges for transporting the same from eastern seaboard points, to wit: from the cities of Boston, New York, Philadelphia and Baltimore to the following points in the State of Tennessee, to wit: Nashville, Memphis and Chattanooga; but these defendants deny that said three last-named cities compete for business in the same territory; and these defendants further deny that they are charging and collecting for transporting like property from said seaboard points to the city of Chattanooga higher rates under the same, or substantially the same, circumstances and conditions that they are charging and collecting for transporting like property to the cities of Memphis and Nashville.

4. These defendants admit that they transport property shipped at said eastern seaboard points to the points in the State of Tennessee enumerated in paragraph 3; but deny that they necessarily transport said freight through the city of Chattanooga to the said cities of Nashville and Memphis, these defendants having another line to said cities of Memphis and Nashville. They admit that said cities are, respectively, 151 miles and 310

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miles beyond Chattanooga from said seaboard points and the said city of Chattanooga.

5. These defendants admit that they refuse to transport like property to the city of Chattanooga at the same rates that they transport property from the said seaboard points to the city of Memphis or to the city of Nashville, and they admit that they charge less rates for hauling to said two last-mentioned places than they do to the city of Chattanooga; but they deny that their actions in charging less rates to the said cities of Memphis and Nashville is in violation of section 4 of the act to regulate commerce, or of any other provision of said act.

6. These defendants deny that the rates charged to Chattanooga are too high or that they are unreasonable, or unjust, or that they should be reduced by reason of any of the matters charged in said complaint.

7. These defendants deny that the transportation of property from said eastern seaboard points at lower rates to Nashville and to Memphis than to Chattanooga is in violation of section 4 of the act to regulate commerce, or that it is in violation of section 2 of said act. They deny that said rates unjustly discriminate against the merchants of Chattanooga in favor of the merchants of Nashville and Memphis. They deny that said rates are in violation of section 3 of said act to regulate commerce, which forbids unreasonable preference to be given any locality, and they say that the rates given to Memphis and Nashville are regulated and determined by other considerations than by the distance respectively of said places from said eastern seaboard points; that Memphis is on the Mississippi river, and the rates to said city are largely determined by this fact. The city of Nashville is on the Cumberland river, and the rates to that point are largely affected by this consideration.

8. These defendants deny that the rates mentioned in said complaint are violations of section 1 of the act to regulate commerce, and these defendants deny that any acts of theirs can be construed as admitting any violation of said section. These defendants say that the said complainant has no right to draw any conclusions from any acts of these defendants in soliciting freights from eastern points to Nashville and Memphis as any admission that they are violating any of the sections of said interstate-commerce act.

9. These defendants admit that the rates to Nashville
23 and Memphis from the seaboard points mentioned in paragraph 3 of the complaint are not made through Chattanooga, and they say that this and other circumstances fully justify them in making the rates of freight to Nashville and Memphis from eastern seaboard points, via their lines, less than the rates charged to Chattanooga, and they say that the rates to Chattanooga should not be made less than the rates to Nashville or Memphis, or the same amount, because there are other distinct circumstances which control the transportation of freight to said points.

10. These defendants say that the existence of water transportation to Nashville and Memphis does warrant the defendants in making a different rate to said points than is made to Chattanooga

and these defendants say that the rates to Chattanooga are reasonable and just to said Chattanooga and other cities in like situation.

11. These defendants are not advised as to what effect the opening of the Muscle Shoals canal in the coming summer will have upon the rates to Chattanooga; but these defendants say that such matters are now entirely irrelevant and immaterial to the questions now before the commission.

12. These defendants do not admit that the rates as set forth in the 12th paragraph of said petition are correctly stated, but they refer to the tariff on file in the office of the Interstate Commission as showing what said rates in fact are.

13. These defendants, further answering, deny that any inspection of the rates contained in said tariff will sustain any of the conclusions set forth in any of the paragraphs of said complaint.

And these defendants, having fully answered, pray that the said complaint may be dismissed against them, and that they may be discharged with their reasonable costs in this behalf sustained.

LAWTON & CUNNINGHAM,
Attorneys for the Central Railroad and Banking Company of Georgia and the Ocean Steamship Company of Savannah.

GEORGIA, }
Chatham County. }

W. F. Shellman, being duly sworn, says that he is traffic manager of The Central Railroad and Banking Company of Georgia, and for The Ocean Steamship Company of Savannah, defendants in this proceeding, and that the foregoing answer is true, as he verily believes.

W. F. SHELLMAN, *T. M.*

24 Sworn and subscribed to before me, this May 13th, 1890.
[SEAL.] H. W. JOHNSON,
Not. Pub., Chatham Co., Geo.

EXHIBIT F.

Answer to Complat., Chattanooga Board of Trade.

Norfolk and Western Railroad Company, office of general freight agent.

ROANOKE, VA., *May 13th*, 1890.

E. A. Moseley, Esq., sec'y Interstate Commerce Commission, Washington, D. C.

DEAR SIR: I beg to transmit herewith a farther answer of the Norfolk and Western Railroad Company, a common carrier, at interest in the transportation of traffic between eastern seaboard cities and Chattanooga, Tenn., to the complaint of the board of trade of said city of Chattanooga, concerning discriminations in freight rates.

The Norfolk and Western Railroad Company, by myself, joined with the East Tennessee, Virginia and Georgia Railroad Company in a formal answer to said complaint, under date of May 6, 1890, but has considered it proper to make this farther answer in order that the commission may be fully informed as to the views entertained by the Norfolk and Western Railroad Company as one of the carriers at interest, upon the merits of the particular questions complained of.

Very respectfully, A. POPE, *G. F. A.*

ROANOKE, VA., *May 12th*, 1890.

To the honorable Interstate Commerce Commission, Washington, D. C.:

The Norfolk and Western Railroad Company, a common carrier and having a community of interest in the transportation of traffic between the eastern seaboard cities of the United States and Chattanooga, Tenn., Memphis, Tenn., and Nashville, Tenn., and various other points in the South and Southwest reached through Chattanooga, Tenn., with other railway lines, and likewise with steamship lines named in the complaint of the Board of Trade of Chattanooga, Tenn., made to your honorable body on April 19, 1890, as concerning alleged discriminations in the adjustment of rates of transportation of freight between the cities of Boston, New York, Philadelphia and Baltimore, and Chattanooga, Memphis and Nashville, Tenn., respectfully make, on their own behalf, a further answer to said complaint in addition to the general answer made under date of May 6, 1890, in connection with the East Tennessee, Virginia and Georgia railway, and confirming the statement as made, specifically or generally, in said answer, beg to admit the general correctness of the mileages referred to, and as to the correctness of the total rates named would respectfully refer to the tariffs that are on file in the office of your honorable body and which are matters of record; denying likewise in general and in detail the similarity of conditions alleged, and the correctness of the statements made in said complaint, that the areas of trade in the territory reached by the three points, (viz, Chattanooga, Nashville and Memphis) are uniformly open alike to each, or would under uniform conditions of rates of freight be penetrated with equal facility by each of these markets. They likewise submit that the charges made are unsupported by any specific statement of the measure of damage sustained, either now or in the past, to the mercantile, manufacturing or other industrial interests of the city of Chattanooga, either in a collective or individual form, and that because of the absence of proof of said specific measure of damage the complaint should be considered as wholly in the nature of rivalry or competition between the city of Chattanooga and the other cities referred to.

The Norfolk and Western railroad likewise respectfully submits that it does not believe that it has violated or is now violating any portion of the 4th section of the act to regulate commerce, or any other section thereof, by participating as a party at interest in the

adjustment of the rates in question or in the transportation of property under the rates now employed; nor is it now, nor has it been at any time in the past, their intention to violate said law in any particular in said rate adjustment or in said transportation. It believes that the circumstances of direct water competition at the points of contact therewith, especially at Memphis, via the various lines along the Atlantic and Gulf coast via New Orleans and the Mississippi river, and likewise the effect of direct water competition at Nashville by means of the Cumberland river and the con-
26 nections that it enjoys with the Ohio river, and likewise the controlling forces of competition by other railway lines at Nashville than those over which the service in connection with the Norfolk and Western railroad is performed as between eastern cities and Nashville, which controlling forces of competition are created by the adjustment of rates over the direct railway lines from eastern markets to the cities of Cincinnati, Louisville and other dependent territory, and the adjustment of rates from said points in connection with said rates to said cities being made dependent at all times upon the rates that are in effect by the water routes named, and as a consequence, by combinations thus made, yield the total rates that are employed in Nashville traffic,—are causes that give ample justification to the use by the way of lines through Chattanooga of the rates that are in effect at Nashville. It is respectfully submitted that the forces of direct water competition referred to, being in no respect amenable to the control of the act to regulate commerce, are uncontrollable thereby, and that these and the other forces referred to are not of recent growth, nor are the rates that have been operative to the cities of Nashville and Memphis of recent adjustment. The whole fabric of rates on eastern traffic to the cities named has been built for a long series of years upon this basis or others approximating thereto, and the traffic of the cities referred to has been continuously done thereupon, and whatever degree of prosperity has been yielded to these cities on said eastern cities' traffic is the result of these rate adjustments. Along the line of railway, 310 miles in length, between Chattanooga and Memphis, at the various points thereon that are junctions with other railways, or at the various stations, intermediate, rates have been adjusted relatively higher than to Memphis, as said points were more or less distant from Memphis or as the effect of water competition became weaker. For instance, rates between New York and Grand Junction, Tenn., 52 miles distant from Memphis, and between New York and Corinth, 93 miles distant from Memphis, and between New York and Decatur, Ala., 188 miles distant from Memphis, are uniform with those now current to Chattanooga, and there is no evidence that this adjustment is in any respect unsatisfactory to the markets or points named. A precisely similar state of rate adjustment exists upon the direct line between Chattanooga and Nashville, rates between New York and Murfreesboro, Tenn., 33 miles distant from Nashville, being $1.16, $0.99, $0.78, $0.57, $0.50, $0.42; between New York and Decherd, Tenn., 82 miles distant
27 from Nashville, are $1.33, $1.15, $0.94, $0.68, $0.60, $0.49 This is equally true for points intermediate between Chatta

nooga and Cincinnati. Rates between New York and Rockwood, Tenn., 70 miles distant from Chattanooga, are $1.20, $1.08, $0.92, $0.66, $0.57, $0.52; between New York and Tracy City, 84 miles distant from Chattanooga, $1.36, $1.33, $1.10, $0.87, $0.78, $0.71.

Your respondent invites attention to the fact that with the revision of the rate adjustment as demanded by the complainants, on lines of uniformity at Chattanooga with rates at Nashville, that intermediate points between Nashville and Chattanooga would be given the same rates as those two points. Upon the same theory of reasoning, rates between Chattanooga and Cincinnati would not be higher than the current Nashville rates. Rates between Chattanooga and Memphis would not be higher than the Memphis rates, and those protective conditions for assuring to the market of Chattanooga the advantages as a point of concentration of traffic and distribution therefrom to the surrounding territory, as now demanded by the complainants, would be impossible.

Your respondent believes that there are natural causes between Nashville and Chattanooga, Tenn., or between Cincinnati, Ohio, and Chattanooga, Tenn., in the shape of ranges of mountains and streams that divide the territories naturally, and as a consequence, commercially, that absolutely prevent under any reasonable conditions, a growth of trade to any extent northward from Chattanooga in the direction of Nashville for any considerable distance along the line of the Nashville, Chattanooga and St. Louis railway, or northward in the direction of Cincinnati along the line of the Cincinnati Southern railway; that the character of the productions of the territories named, the interdependence of the communities in said sections, one upon another and in their relations towards the larger markets that lie in the direction of Ohio, Kentucky or Indiana, as well as the community of interest between the cities of Nashville or Cincinnati and the towns along the respective lines of railway named, are sufficient to determine or control the trade of said communities toward said cities or other- adjacent thereto.

The adjustment of rates between eastern cities and Chattanooga in a uniform measure with those for all important points in interior Alabama and Georgia, was because of the necessity that existed, commencing in 1868, for harmonizing the various commercial interests of said towns and cities, and as the result of such
28 effort, a system of rate adjustment was indicated in 1874, under the auspices of an association then formed, called the Southern Railway and Steamship Association, which, first embracing the cities of Atlanta, Chattanooga, Montgomery, Selma, Rome, became enlarged in its area as other railway lines were built and as the freight interests of other towns interested became enlarged. The cities or towns taking rates uniform with Chattanooga at this time are, Anniston, Ala., Athens, Ga., Atlanta, Ga., Birmingham, Ala., Cedartown, Ga., Columbus, Ga., Dalton, Ga., Montgomery, Ala., Eufaula, Ala., Rome, Ga., Selma, Ala., Meridian, Miss., Opelika, Ala., Talladega, Ala., and possibly others. The natural conditions that exist, as well as the transportation facilities that are enjoyed by each of these towns, make them more or less competitive with each

other, and a large portion of them competitive with Chattanooga, those more particularly competitive with Chattanooga being Anniston, Ala.; Atlanta, Ga.; Birmingham, Ala.; Rome, Ga., and Dalton, Ga.; and taking New York as a representative point, the rates to said points are as have been named by the complainants, viz: $1.14, $0.98, $0.86, $0.73, $0.60, and $0.49, for the six figured classes of merchandise traffic; and your respondent believes that the competition for business and the interchange of traffic one town with another or one territory with another, in which Chattanooga is most largely if not wholly interested, is with the towns named or with the territories that said towns likewise reach, and that it is in reference to rate adjustment in connection with these towns that the efforts of the complainants should be directed.

Under these uniform conditions of rates for a long series of years, absolutely peaceful conditions have maintained and the various communities have relatively prospered, without such prosperity particularly infringing upon that of their neighbors; and the equity of this adjustment can be defended upon the following theory of calculation, there being three leading lines from eastern cities that monopolize the traffic to the towns referred to, viz: those via Savannah, Ga., those via West Point, Va., over the Richmond and Danville system of lines, and those via Norfolk and the Virginia, Tennessee and Georgia air line, the average distance from New York to the 14 southern points named, including Chattanooga, being via Savannah, 639 miles, via the Richmond and Danville lines, 606 miles, and via Norfolk and the Virginia, Tennessee and Georgia air line, 642 miles; and it will therefore be seen that as between the leading competitors for this traffic, the average distance by each varies but slightly.

29 In addition to these lines there are all-rail route connections through Washington and Alexandria via the Richmond and Danville system and through Harrisburg and Hagerstown, Md., via the Norfolk and Western system, but by adjustment as between the parties at interest, uniform or differential rates as may be agreed upon are maintained by these all-rail lines. This question of rate adjustment between eastern and southern cities having been brought to the attention of the board of arbitration of that association of roads known as the Southern Railway and Steamship Association, upon the demand for certain revision of rates to Chattanooga, Tenn., Atlanta, Ga., and other points, on May 28, 1889, exhaustive argument was made by all parties to the case, and the decision of the board as rendered on July 19, 1889, was that the rates to Chattanooga and Atlanta remain as at present in effect, and said rates are those that are now in force. A copy of the decision of said board of arbitration is attached hereto and made part of this answer, and if desired, the various arguments upon this question can likewise be submitted.

Therefore it is, that reviewing the adjustment of rates as between Chattanooga, Memphis, and Nashville, your respondent believes that the conditions of transportation to Memphis and to Nashville are substantially dissimilar from those that exist to Chattanooga; that

no injury accrues to the traffic of Chattanooga by said adjustment and that no measure of damage can be successfully shown. Your respondent likewise believes that the controlling forces of competition as between the markets to the south and southwest of Chattanooga, in the territories directly open to the competition of traffic, one with another, render it proper on the part of the various transportation companies to adjust their rates on the lines of uniformity that exist; that the conditions requiring said adjustment originated many years ago, at a time that rates averaged from fifty to sixty-six per cent. higher between eastern cities and said territory than those that are now current; that the revision of these rates was the result of conference from time to time had with the mercantile bodies or shippers, either of large or small quantities of freight, in each of the cities and towns named; that it became necessary to meet the questions as they were presented, and to effect the adjustments that were then made; that the maintenance of these rates, which has been accomplished by the various association methods that have been employed, has been absolutely essential to the well being of the communities involved; and that these rates have been in effect with but slight variations for a series of years, and testimony is concurrent that they are giving general satisfaction to the various communities at interest.

In support of this method of adjustment, your respondent would refer to the opinion set forth in various pages of the decision rendered by your honorable body in the case of the Louisville and Nashville railroad, as of date June 15th, 1887, as particularly appearing on pages 17, 20, 24, and 25, and as recapitulated in the decisions reached in said case, as appearing in detail on pages 27, 28, and 29.

Therefore, your respondent asks that they shall not be required by any order of your honorable body, either to participate in advanced rates to Memphis or to Nashville, or in reduced rates to Chattanooga, most respectfully assuring you that in case a reduction of the rates to Chattanooga is ordered, the entire fabric of rate construction to the various competing points in the south and southwest that are enumerated will likewise necessarily be reduced, and that, therefore, the positions of competition relatively between Chattanooga and the various points at interest will in nowise be changed, nor the traffic of Chattanooga receive that material and special benefit that it is assumed by the complainants in the present case should be enjoyed by that city.

Reserving the right to make such further and more specific answer that may become necessary, this answer is respectfully submitted.

THE NORFOLK AND WESTERN RAILROAD COMPANY,
By A. POPE, *General Freight Agent.*

STATE OF VIRGINIA, *City of Roanoke,* } *To wit:*

I, D. H. Scott, a notary public, in and for the city aforesaid, do hereby certify that A. Pope, whose name is signed to the foregoing writing, has this day acknowledged the same before me in the said

city aforesaid. Given under my hand and notarial seal this 13th day of May, 1890.

[SEAL.] D. H. SCOTT, *N. P.*

EXHIBIT G.

Western & Atlantic Railroad Co., traffic department.

ATLANTA, GA., *May* 12, 1890.

The Interstate Commerce Commission, Washington, D. C.

GENTLEMEN: I have your communication of April 19th, 31 inclosing copy of petition filed against our company, embracing statement of charges made by the Board of Trade of Chattanooga—the substance of the complaint being that this company, with others named in the petition, is violating the interstate-commerce law, in that we transport goods from eastern cities to Nashville and Memphis at less rates than to Chattanooga.

Inasmuch as this company is a very small factor in either the participation of rates or of the volume of business transported, I do not consider it necessary to take up in their number the sections of the complaint and answer each separately. I thing that one general answer for this company will meet all the specifications.

I will state that this company is a member of the Southern Railway and Steamship Association and has a part in the fixing of rates from eastern cities to Chattanooga, and other points south and southeast of that city. The jurisdiction of the association does not extend beyond Chattanooga on the north or west, and therefore the association has no part whatever in fixing the rates to either Nashville or Memphis.

The rates from eastern cities to the two points named are made by a combination of the trunk-line rates to Louisville or Evansville and the water rates from those two cities or either of them to Nashville and Memphis.

This company abstained for years from participating in handling business from eastern cities to Nashville and Memphis; in fact, even at present we have no agent in Memphis, and probably do not handle a shipment a month or one in six months to that city.

Seeing, however, that there was considerable business going from the East to Nashville, and that our abstinence from participation in it did not prevent either the volume of business or the rates from being maintained, we concluded that we would make an attempt to handle a portion of it.

Inasmuch, therefore, as the rates to Nashville in the first case are made by lines not only not working with us, but working in competition to our line, and as our withdrawal from participation in handling the business would not prevent one pound from going there, and would not affect the rate either by raising or lowering it, it seems to us that the city of Chattanooga should not (to use a homely figure of speech), desire to act the "dog in the manger" by forcing us out of handling it.

We could better afford to withdraw altogether from transporting

any business from eastern cities to Nashville than we could to reduce the Chattanooga rate, which is a just and reasonable
32 rate within itself, and which is on a parity with the rates from the East to Atlanta, Rome, Dalton, and other cities in this territory with which Chattanooga competes. In other words, inasmuch as this company and its associates have given as low rates to Chattanooga from the East as we give from the East to Atlanta, Rome, and Dalton, through which points the Chattanooga freight is transported, it occurs to us that instead of showing a spirit of unfriendliness to Chattanooga we are positively favoring her.

The lines from the East to Chattanooga via Savannah and Charleston, with which this company works, charge Atlanta as high rates as they charge Chattanooga, which is 140 miles further, although the freight is transported through Atlanta to get to Chattanooga. The same statement practically applies to the rates from the East to Rome and Dalton as compared with Chattanooga, the haul being through Rome and Dalton to Chattanooga, a greater distance, with Chattanooga, nevertheless, having as low rates as the points nearer the East.

To repeat, therefore, inasmuch as this company and its associates do not make the rates from the East to Nashville, and as the withdrawal by all of us from handling any business to Nashville would not affect either the eastern tonnage or the rates to Nashville, we cannot see that we should justly be called upon to comply with the demands of the Chattanooga board of trade.

We consider that our participation in business from eastern cities to Nashville, and to Memphis as well, is allowed by the very letter of the interstate-commerce law.

Yours very truly, JOSEPH M. BROWN,
Traffic Manager.

GEORGIA, }
Fulton County. }

Personally appeared before me, Charles T. Watson, a notary public in and for the county of Fulton, Joseph M. Brown, traffic manager of the Western and Atlantic Railroad Company, who, being duly sworn, says on oath that the above statements are true to the best of his knowledge and belief.

Subscribed and sworn to before me this 16th day of May, 1890.

[SEAL.] C. T. WATSON,
Notary Public.

33 EXHIBIT H.

THE BOARD OF TRADE OF CHATTANOOGA }
vs.
THE DELAWARE & HUDSON CANAL CO., &C. }

The president, managers, and company of The Delaware and Hudson Canal Co., the defendant above named, in answer to the petition herein, respectfully shows as follows:

1st. Said defendant denies any knowledge or information suffi-

cient to form a belief as to the first allegation or section of said petition.

2nd. Said defendant denies on information and belief the 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th allegations or sections of said petition.

3rd. The said defendant in further answer to said petition alleges that the defendant has no control over the rates referred to in said petition, but that said rates are arranged by a joint committee representing the trunk lines aforesaid, and that this defendant is of necessity obliged to join in any through rates that may be issued by the executive committee of said trunk lines, and this defendant denies on information and belief that it has violated or is violating any clause of the interstate-commerce act.

H. G. YOUNG,
Second Vice-President.

STATE OF NEW YORK, }
County of Albany, } *ss:*

H. G. Young being duly sworn, deposes and says that he is one of the officers of the defendant; that he has read the foregoing answer, and knows the contents thereof; that the same is true to his knowledge, except as to the matters therein stated to be alleged on information and belief; and that as to those matters he believes it to be true.

H. G. YOUNG.

Subscribed and sworn to before me this 19th day of May, 1890.
[SEAL.] WM. F. RATHBONE,
Notary Public, Albany Co., N. Y.

34 EXHIBIT I.

Before the Interstate Commerce Commission.

THE BOARD OF TRADE OF CHATTANOOGA
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY *et al.*

The Pennsylvania Railroad Company, one of the respondents in the above-stated case, for answer to the complaint filed therein, says:

1. That in respect to the matters contained in the said complaint, it has not violated any of the provisions of the act to regulate commerce.

2. That it carries freight over its line as part of three separate through routes from the North to Chattanooga, Nashville and Memphis, namely:

By way of the Delaware peninsula via Norfolk, the Norfolk and Western railroad, and the East Tennessee, Virginia and Georgia railway.

Via the Pennsylvania railroad, Cumberland Valley railroad, Shenandoah Valley railroad, Norfolk and Western railroad, and the East Tennessee, Virginia and Georgia railway.

Via its main line to Pittsburgh, and thence via Pittsburgh, Cincinnati and St. Louis railway via Cincinnati.

That it receives its proportion of the through rate for transportation by either of these routes; that such through rates are not fixed by itself, the rates by the first two routes being fixed by an association of corporations known as the Southern Railway and Steamship Association, of which the Pennsylvania Railroad Company is not a member; that it has no voice in the establishment of the rates by such routes, but accepts such rates as the companies, members of such association, direct it to charge; that the East Tennessee, Virginia and Georgia Railway Company and the Norfolk and Western Railway Company are members of such association.

That the rates for the third route referred to above are fixed by the Trunk Line Association, of which this respondent and many other companies are members, and that such rates were deemed by said association to be just and reasonable.

3. That for further specification of the justification of the rates by the associations aforesaid reference is made to the answers of the other defendants.

35 Wherefore, this respondent prays that the said complaint be dismissed.

THE PENNSYLVANIA RAILROAD COMPANY,
By WILLIAM H. JOYCE,
General Freight Agent.

JAMES A. LOGAN,
Of Counsel for Def't.

STATE OF PENNSYLVANIA, }
City of Philadelphia. }

Before me, the undersigned, personally appeared William H. Joyce, who being duly sworn, doth depose and say that he is the general freight agent of The Pennsylvania Railroad Company, one of the defendants in this proceeding, and that the foregoing answer of that company is true as he verily believes.

WILLIAM H. JOYCE.

Sworn and subscribed before me this 16th day of May, A. D. 1890. Witness my hand and notarial seal.

[SEAL.] A. P. BURCHELL,
Notary Public.

EXHIBIT K.

The Answer of the Nashville, Chattanooga and St. Louis Railway to the Petition of the Board of Trade of Chattanooga.

In answer to the first paragraph of the petition, respondent says that it does not know and cannot admit that the petitioner is char-

tered under the laws of Tennessee, or what its objects are, and will require the petitioner to show to the satisfaction of the commission that it is a corporation duly and legally chartered under the laws of the State of Tennessee.

In response to the second paragraph of the petition, respondent says that it is a common carrier by railway of passengers and freight, but not in the States named or elsewhere, except in the States of Georgia, Tennessee, Alabama and Kentucky, and that in the States last mentioned, in respect to passengers or freight passing through such States, it is subject to the act to regulate commerce. It says that it owns and operates a railway from Chattanooga to Nashville, and *vice versa*.

In response to paragraph No. 3, it says that it receives no freight or passengers at the points named, to wit: New York, Massachusetts, Philadelphia and Baltimore. It admits that it takes at
36 through rates all freight or passengers brought to Chattanooga by other roads, and destined for Nashville, Tennessee, which is tendered to it at Chattanooga, Tennessee, and destined for Nashville, Tennessee, but denies that it carries any freight to Chattanooga from the East, as it neither owns nor operates any railroad running into Chattanooga, except the one from Nashville. It denies that it participates in through rates upon any freight brought into Chattanooga, and destined therefor, by any of its codefendants, or that it participates in any rate, through or otherwise, brought to or stopped at Chattanooga by any of its codefendants, but it does admit that it takes freight destined for Nashville of its codefendants at Chattanooga from the points mentioned at through rates, and participates therein with its codefendants.

In reply to paragraph No. 4, respondent says that Nashville is 151 miles distant from Chattanooga, and "beyond it," in respect to all freight delivered to it at Chattanooga, by any of its codefendants, and it further admits that freight shipped to Nashville from the points named, and brought to Chattanooga by any of its codefendants, is taken to Nashville at a cheaper rate than when the same is stopped at Chattanooga, but this respondent has nothing to do, in fixing the rates *in* or participating therein, on freight shipped from any of the named points to Chattanooga, and that it only participates in through rates on shipments to Nashville from the points named.

Respondent denies the allegations of the 5th paragraph entirely, and says that it has nothing to do with the shipments from the eastern seaboard to Chattanooga and does not participate therein.

Respondent denies the allegations of the 6th paragraph of the petition.

Respondent denies the 7th allegation of the petition.

Respondent denies the 8th allegation of the petition, in so far as the same respects this respondent.

Respondent says that it is not bound to make answer to the allegations of the 9th paragraph of the petition, for the reason that they do not apply to it, and it has nothing to do with shipments

from the points named to Chattanooga, and does not participate therein.

Respondent says in respect to the allegation of the 10th paragraph that the same is an argument and alleges no fact that the respondent is called on to admit or deny, but it says that there is a waterway from Chattanooga to Nashville, for the whole or part of the way; that Chattanooga is located on the Tennessee river,
37 which empties into the Ohio river, and that Nashville is located on the Cumberland river, which empties into the Ohio river, and these are navigable waters.

In response to the 11th paragraph, respondent says that it is an argument based upon what it assumes will be a future fact, and which may or may not transpire, and is certainly not an existing fact upon which the commission can give a judgment.

In response to the 12th paragraph, respondent says that the same is an argument with illustrations, and merely contrasts the acts and doings of other railroads with defendant's, and may or may not be good and valid arguments and illustrations.

For the Nashville, Chattanooga and St. Louis railway:

EAST & FOGG AND
CHAS. D. PORTER.
J. W. THOMAS, *President.*

STATE OF TENNESSEE, }
County of Davidson. }

J. W. Thomas, being duly sworn, says that he is the president and general manager of The Nashville, Chattanooga and St. Louis Railway, defendant in this proceeding, and that the foregoing answer is true, as he verily believes.

Subscribed and sworn to before me, this 20th day of May, 1890.

[SEAL.] J. T. SPAULDING,
Notary Public.

EXHIBIT L.

Before the Interstate Commerce Commission.

THE BOARD OF TRADE OF CHATTANOOGA
against
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY Company, * * * The New York, Lake Erie and Western Railroad Company, and Others.

The New York, Lake Erie and Western Railroad Company, one of the respondents named in the above-entitled proceeding, for a separate answer to the petition of the complainant in this proceeding, says:

First. It has no knowledge of the matters alleged in the first paragraph of said petition, and therefore it can neither admit nor deny the same, but requires proof thereof.

38 Second. This respondent admits that it engaged, with some of its corespondents, in transporting property and partici-

pating in through rates of freight charges for transporting the same, from the following points, which are designated as eastern seaboard points, namely: Boston, Massachusetts, and New York city, New York; but it avers that it is not now, and has not been heretofore, engaged in transporting freight from Philadelphia, Pennsylvania, or Baltimore, Maryland.

Third. The respondent admits that it is a common carrier engaged in interstate commerce, and, as such common carrier, is subject to the act to regulate commerce.

And this respondent further says that the transportation rate from New York to Chattanooga is made from the sum of two local freight rates via Cincinnati, this respondent charging from New York to Cincinnati its full and regular tariff rate, and the railroads leading south from Cincinnati charging their local tariff rate from Cincinnati to Chattanooga, making the through tariff to Chattanooga two separate and distinct proportions.

Fourth. And this respondent avers that the through rates from New York city to Memphis and Nashville, Tennessee, are made via Louisville, Kentucky, in competition with the water route via New Orleans, Louisiana, and that this respondent accepts as its proportion of the through rates to Memphis and Nashville its *pro rata* proportion of the through rate based on mileage, after allowing the necessary bridge toll at Louisville; and as the freight and traffic sent by this respondent are sent direct to Memphis and Nashville via Louisville, as aforesaid, and do not pass through Chattanooga, this respondent is advised, and therefore avers, that the Board of Trade of Chattanooga has no legal ground of complaint against this respondent under the acts to regulate commerce, as it has no control whatever of the rates to Chattanooga, they being, as before stated, made compulsory by the charge of the local tariff rate from Cincinnati, Ohio, to Chattanooga, while the rates of this respondent from New York city to Memphis and Nashville are made, as hereinbefore stated, in competition with the water route via New Orleans, which competition does not exist at Chattanooga.

Fifth. And this respondent further avers that the whole matter of making rates to all the points above mentioned is in accordance with the action taken by the Trunk Line Association after
39 full and careful consideration of the subject, and said rates are made uniform by all roads leading from New York and Boston to the points hereinbefore mentioned.

Sixth. The respondent having fully answered each and all of the allegations of the complainant's petitions, it respectfully asks that the same, so far as it applies to this respondent, may be dismissed.

THE NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY,
By J. A. BUCHANAN, *Its Attorney.*

STATE OF NEW YORK, *City and County of New York,* } ss:

George H. Vaillant, of New York city, being duly sworn, says that he is the freight-traffic manager of The New York, Lake Erie

and Western Railroad Company, one of the respondents in this proceeding, and that the foregoing answer is true, as he verily believes.

GEORGE H. VAILLANT.

Sworn to before me this 26th day of May, 1890.

GEO. E. GRANT,

[SEAL.] *Notary Public, N. Y. City and Co.*

EXHIBIT M.

The Interstate Commerce Commission.

THE BOARD OF TRADE OF CHATTANOOGA

vs.

THE BOARD OF TRADE OF CHATTANOOGA, GEORGIA RAILWAY, The Norfolk and Western Railroad, The Old Dominion Steamship Company, The Western and Atlantic Railway Company, The Central Railroad and Banking Company of Georgia, The Georgia Railroad, The Ocean Steamship Company of Savannah, The South Carolina Railway, The Clyde Steamship Company, The Cincinnati, New Orleans and Texas Pacific Railway, The Baltimore and Ohio Railroad Company, The Central Railroad of New Jersey, The Nashville, Chattanooga and St. Louis Railway, The Pennsylvania Railroad Company, The Pennsylvania Company, The New York, Lake Erie and Western Railroad, The New York and New England Railroad, The Delaware and Hudson Canal Company.

Answer of the Cincinnati, New Orleans and Texas Pacific Railway Company.

I. Defendant admits that petitioner is an association of the merchants and manufacturers of the city of Chattanooga, in the State of Tennessee, chartered under the laws of said State for the purposes named in petitioner's complaint.

II. Defendant says that it is a common carrier operating, as lessee thereof, a railway, known as the Cincinnati Southern railway, extending from the city of Cincinnati, in the State of Ohio, through the States of Kentucky and Tennessee, to the city of Chattanooga, Tenn.

III. Defendant admits that it is a common carrier and is concerned in the transportation of passengers and property by railroad and water from seaboard points in the States of Massachusetts, New York, Pennsylvania, and Maryland to points in the State of Tennessee in the capacity of an intermediate connecting carrier over its line of railway above described.

IV. Defendant admits that it is, conjointly with the defendants parties hereto, transporting property and participating in through rates of freight charges therefor from the points designated as eastern seaboard points, viz: Boston, New York, Philadelphia, and

Baltimore, to the cities of Memphis and Chattanooga, Tenn., but not to the city of Nashville, Tenn.; that the city of Nashville, Tenn., is not on defendant's line of railway, nor does defendant operate or control any part of any through route from the aforesaid eastern seaboard points to said Nashville. Defendant admits that the through rates aforesaid are lower for the transportation of like property from said eastern seaboard points to the city of Memphis than to the city of Chattanooga, but it denies that the circumstances are the same or substantially the same under which said transportation to said cities is conducted.

V. Defendant admits that it participates in the transportation of property shipped at eastern seaboard points to the cities of
41 Memphis and Chattanooga, and that such property is in a few instances transported through the city of Chattanooga to the city of Memphis, but it says that the charges for transporting such property, so far as its participation therein is concerned, is determined and controlled by the fact that between Cincinnati, Ohio, at which point defendant's connection with such transportation begins, and the said city of Memphis, Tenn., there extends a water route, along the Ohio and Mississippi rivers, over which, at all seasons of the year, the business of transporting such property is carried on by a relatively cheap and inexpensive method, which fixes the rate which must be accepted by all railroads doing business between said Cincinnati and said Memphis, which said rates are much below what would be a fair and reasonable compensation for such service by rail, and if applied to points not favored by nature with water routes, would prove ruinously inadequate to the cost of the service performed.

VI. Defendant says that the rates from said eastern seaboard points to said Chattanooga are not unreasonable and unjust in themselves and do not subject said city of Chattanooga to any undue or unreasonable prejudice or disadvantage.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY,
By EDWARD COLSTON, *Its Attorney.*

STATE OF OHIO, *Hamilton County,* } ss:

Before me, David F. Kronacher, a notary public in and for said county and State, personally appeared C. C. Harvey, vice-president of The Cincinnati, New Orleans and Texas Pacific Railway Company, one of the defendants in above case, who, being duly sworn, deposes and says that the facts set forth in the foregoing petition are true, as he verily believes.

C. C. HARVEY.

Sworn to before me and subscribed in my presence this 6th day of June, 1890.

DAVID F. KRONACHER,
Notary Public, Hamilton County, Ohio.

[SEAL.]

42 EXHIBIT N.

The Interstate Commerce Commission.

BOARD OF TRADE OF CHATTANOOGA
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY ET AL.

The answer of The New York and New England Railroad Co., one of the parties named as respondents in the above-entitled petition.

1. This respondent neither affirms nor denies the allegations in said petition, except as hereinafter may appear, but leaves the petitioner to prove the same.

2. It denies that the position of Chattanooga is the same or like that of Memphis and Nashville, and that Chattanooga has, or will have, means of water communication and transportation, such as Memphis and Nashville now enjoy.

3. It denies that the present through rates unjustly discriminate against the merchants of Chattanooga or give an unreasonable preference to any locality, or in any way violate the act of Congress to regulate commerce.

4. This respondent prays leave to file this, its answer to the aforesaid petition, and to submit itself to the jurisdiction of said Interstate Commerce Commission.

THE NEW YORK AND NEW ENGLAND RAILROAD COMPANY,
By CHARLES HOWARD, *General Manager.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

Then personally appeared the above-named Charles Howard and made oath that the facts alleged in the foregoing answer are true to the best of his knowledge and belief, before me—

R. D. WESTON SMITH,
Justice of the Peace.

Boston, June, 1890.

43 EXHIBIT O.

The Interstate Commerce Commission.

THE BOARD OF TRADE OF CHATTANOOGA
against
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY, * * * The South Carolina Railway Company, and Others.

D. H. Chamberlain as receiver of the South Carolina Railway Company in answer to the petition herein says:

1. That it is true that the South Carolina Railway Co. is engaged

with some of the codefendants named in transporting property and participating in through rates of freight charges for the same from the points on the eastern seaboard, as designated in the 2nd paragraph of said petition, being a link in the route made by connection with the Clyde steamship line at one terminus and the Georgia railroad at the other.

2. That it is true that the rates from New York and other eastern seaboard points to Memphis and Nashville are lower than the rates to Chattanooga, but respondent denies that the conditions and circumstances are the same, or substantially the same, denies that the rates to Chattanooga are too high, or that they are unreasonable or unjust or in violation of any of the provisions of the act to regulate commerce.

3. This respondent, in further answer to said petition and in justification of such acts as are herein admitted or as may be proved and are pertinent to the South Carolina Railway Company, of which he is receiver, avers that the rates of transportation from New York and other eastern seaboard points to Memphis and Nashville are made by railway corporations and associations with which his company has no connection; that neither he nor the South Carolina Railway Company nor the companies which form the line of which it is a link have any voice in or control in the making of such rates from eastern cities to said points, said rates being made in competition with the water route via New Orleans, which competition does not exist at Chattanooga, and the line of which respondent's company is a part simply meets the rate so made, not being able to affect the same by action or inaction, that it accepts the *pro rata* proportion of such through rate thus made compulsory, and as its business to such points is small it would be better for it to withdraw altogether from any participation in such business rather than reduce the rates to Chattanooga as prayed for in said petition.

4. The respondent further says that many of the matters and things stated in said petition are beyond his knowledge; he therefore denies all the allegations of said petition not hereinabove specifically admitted, and prays to be hence dismissed with his reasonable costs.

WM. H. BRAWLEY,
Att'y for D. H. Chamberlain, Receiver.

STATE OF SOUTH CAROLINA:

D. H. Chamberlain, being duly sworn, says that the facts stated in the foregoing answer as of his own knowledge are true; those stated as on information and belief, he believes to be true.

D. H. CHAMBERLAIN.

Sworn to and subscribed before me this 12th day of June, 1890.
[SEAL.] NATH'L LEVIN,
Notary Public.

EXHIBIT P.

Before the Interstate Commerce Commission.

BOARD OF TRADE OF CHATTANOOGA
vs.
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and Others.

Answer of the Central Railroad Company of New Jersey.

The Central Railroad Company of New Jersey, by Robert W. de Forest, its attorney, answers the complaint herein as follows:

First. It has no knowledge or information sufficient to form a belief as to any of the allegations of the complaint which relate to business done by the complainants or by railroad companies other than itself.

45 Second. It denies that it makes through rates from any seaboard points named in the petition to Chattanooga, Memphis, and Nashville.

Wherefore, it prays that the petition may be dismissed so far as concerns it.

ROBERT W. DE FOREST,
Counsel C. R. R. of N. J.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

Samuel Knox, being duly sworn, on his oath, says:

I am secretary of the Central Railroad Company of New Jersey; I have read the foregoing answer, the same is true to my knowledge, except as to matters therein stated on information and belief, and as to those matters I believe it to be true.

SAM'L KNOX.

Sworn to before me this 17th day of June, 1890.

[SEAL.] W. C. JOHNSON,
Notary Public for Kings Co.

Certificate filed in N. Y. county.

EXHIBIT Q.

Before the Interstate Commerce Commission.

THE BOARD OF TRADE OF CHATTANOOGA
v.
THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY; The Norfolk & Western Railroad Company; The Old Dominion Steamship Company; The Western & Atlantic Railroad Company; The Central Railroad & Banking Company of Georgia; The Georgia Railroad Company; The Ocean Steamship Company of Savannah; The South Carolina Railway Company; The Clyde Steamship Company; The Cincinnati, New Orleans & Texas Pacific Railway Company; The Baltimore & Ohio Railroad Company; The Central Railroad Company of New Jersey; The Nashville, Chattanooga & St. Louis Railway Company; The Pennsylvania Railroad Company; The Pennsyvania Company; The New York, Lake Erie & Western Railroad Company; The *The* New York & New England Railroad Company, and The Delaware & Hudson Canal Company.

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Complaint filed April 9, 1890. Answers filed May 5 to June 20, 1890. Heard at Chattanooga, Tennessee, November 12, 1890. Briefs filed January 2 to January 20, 1891. Decided December 30, 1892.

1. Upon complaint alleging that rates on traffic from New York and other Atlantic seaboard points to Chattanooga are unreasonable and greater for the shorter distance to Chattanooga than for the longer distance over the same line in the same direction to Memphis and Nashville:

Held, that defendants are justified by the existence of water competition of controlling force in charging less on such traffic for the longer distance to Memphis, but that no such competition exists for such traffic to Nashville, and any greater charge for the transportation of like kind of property from said seaboard points for the shorter distance to Chattanooga than for the longer distance through Chattanooga to Nashville is in violation of the fourth section of the act to regulate commerce. Defendants ordered to cease and desist from making such greater charge to Chattanooga, with leave to file application for relief under the proviso clause of the fourth section within a specified time. Ga. R. R. Com. *v.* Clyde SS. Co. *et al.*, 4 Inters. Com. Rep., 120; 5 I. C. C. Rep., 324, cited and affirmed.

2. One transportation line cannot be said to meet the competition of another transportation line for the carrying trade of any particular locality, unless the latter line could and would perform the service alone if the former did not undertake it.

3. When great disparity exists between charges which are lower to competitive than to intermediate points much less remote, the

inference is irresistible that the lower rate must be unremunerative upon any theory, or else the larger rate gives an unwarranted return for the service rendered.

47 G. C. Connor, J. A. Moon and E. S. Daniels, for complainant.

W. M. Baxter, for the East Tennessee, Virginia & Georgia Railway Company.

A. Pope, for the Norfolk & Western Railroad Company and Old Dominion Steamship Company.

Lawton & Cunningham, for the Central Railroad & Banking Company of Georgia and the Ocean Steamship Company of Savannah.

Shepherd & Cist, for the Cincinnati, New Orleans & Texas Pacific Railway Company.

Clarke & Brown, for the Nashville, Chattanooga & St. Louis Railway Company.

Report and Opinion of the Commission.

KNAPP, *Commissioner:*

The complainant, an association of merchants and manufacturers of the city of Chattanooga, Tennessee, incorporated under the laws of that State in the name of "The Board of Trade of Chattanooga," alleges that its objects, among others, are "to study the workings of our" (the Chattanooga's) "system of transportation, upon which our" (Chattanooga's) "commercial prosperity depends so largely, and to endeavor to remedy, by all proper means, the defects and abuses existing therein;" and that the defendants, as common carriers engaged in interstate commerce, "separately and jointly, have been and are now transporting property and participating in through rates of freight charges for transporting the same," from Boston, New York, Philadelphia and Baltimore, designated as eastern seaboard points, to Nashville, Memphis and Chattanooga, in the State of Tennessee.

The complaint charges in substance:

1. That the through rates to Chattanooga participated in by the defendants are unjust and unreasonable in themselves (as well as relatively to those to Nashville and Memphis), and therefore in violation of section 1 of the act to regulate commerce.

2. That Nashville, Memphis and Chattanooga compete for business in the same territory; that the through rates so charged and participated in by defendants are much lower to Nashville and Memphis than to Chattanooga "for transporting like property from said seaboard points under the same, or substantially the same
48 circumstances and conditions;" and that the defendants are thus guilty of unjust discrimination against Chattanooga, in violation of section 2 of the act to regulate commerce, and of giving an undue preference or advantage to Nashville and Memphis and subjecting Chattanooga to an undue prejudice or disadvantage in violation of section 3 of said act.

3. That the defendants are guilty of a violation of section 4 of

the act to regulate commerce, in that under said through rates they charge and receive a greater compensation for the transportation of the "like kind of property, under substantially similar circumstances and conditions" from said eastern seaboard cities to Chattanooga than they charge and receive for such transportation over their several lines through Chattanooga to Nashville and Memphis, which latter cities are respectively 151 miles and 310 miles farther from said eastern seaboard points.

In proof of these allegations, complainant refers to the tariffs on file with the Interstate Commerce Commission, and gives tables illustrating the alleged discriminating and otherwise illegal character of said rates.

The prayer of the complainant is, that, after hearing and investigation by this commission on due notice, "an order be made commanding the defendants to cease and desist from said violations of the act to regulate commerce, and that said order require them to transport property to Chattanooga from eastern seaboard points at such rates as this commission may decide to be just and reasonable," and "to cease transporting property from eastern seaboard points to the cities of Nashville and Memphis at lower rates of freight charges than they charge and collect for transporting like property to the city of Chattanooga; and for such other and further order as the commission may deem necessary to grant relief to the merchants and manufacturers of Chattanooga."

All of the defendants filed answers to the complaint except The Pennsylvania Company, The Old Dominion Steamship Company and The Clyde Steamship Company.

Some of these answers put in issue the allegation of complainant that Nashville, Memphis and Chattanooga compete for business in the same territory, and the answer of the Norfolk & Western Railroad Company sets up that "there are natural causes between Nashville and Chattanooga, or between Cincinnati and Chattanooga, in the shape of ranges of mountains and streams that divide the territories naturally and, as a consequence, commercially, that absolutely prevent, under any reasonable conditions, a growth
49 of trade to any extent northward from Chattanooga in the direction of Nashville for any considerable distance along the line of the Nashville, Chattanooga & St. Louis railway, or northward in the direction of Cincinnati along the line of the Cincinnati Southern railway; that the character of the productions of the territories named, the interdependence of the communities in said sections one upon another, and in their relations towards the larger markets that lie in the direction of Ohio, Kentucky or Indiana, as well as the community of interest between the cities of Nashville or Cincinnati and the towns along the respective lines of railway named, are sufficient to determine or control the trade of said communities toward said cities or others adjacent thereto." This answer also contains the following statement: "The adjustment of rates between eastern cities and Chattanooga in a uniform measure with those for all important points in interior Alabama and Georgia, was because of the necessity that existed, commencing

in 1868, for harmonizing the various commercial interests of said towns and cities, and, as the result of such effort, a system of rate adjustment was indicated in 1874, under the auspices of an association then formed, called the Southern Railway & Steamship Association, which, first embracing the cities of Atlanta, Chattanooga, Montgomery, Selma and Rome, became enlarged in its area as other railway lines were built and as the freight interests of other towns interested became enlarged. The cities or towns taking rates uniform with Chattanooga at this time are, Anniston, Ala., Athens, Ga., Atlanta, Ga., Birmingham, Ala., Cedartown, Ga., Columbus, Ga., Dalton, Ga., Montgomery, Ala., Eufaula, Ala., Rome, Ga., Selma, Ala., Meridian, Miss., Opelika, Ala., Talladega, Ala., and possibly others. The natural conditions that exist, as well as the transportation facilities that are enjoyed by each of these towns, make them more or less competitive with each other, and a large portion of them competitive with Chattanooga, those more particularly competitive with Chattanooga being Anniston, Ala., Atlanta, Ga., Birmingham, Ala., Rome, Ga., and Dalton, Ga., and taking New York as a representative point, the rates to said points are as have been named by the complainants, viz., $1.14, $.98, $.86, $.73, $.60 and $.49, for the six figured classes of merchandise traffic; and your respondent believes that the competition for business and the interchange of traffic one town with another or one territory with another, in which Chattanooga is most largely if not wholly interested, is with the towns named or with the territories that said towns likewise reach, and that it is in reference to rate adjustment in connection with these towns that the efforts of the complainants should be directed."

It is expressly admitted in most of the answers, and not denied in any, that the through rates from said eastern seaboard cities are higher to Chattanooga than to Nashville and Memphis; but it is claimed that this is not in violation of any of the provisions of the act to regulate commerce, because it is alleged the rates to Nashville and Memphis are forced upon the defendants by actual water competition of controlling force at both said points, and the transportation thereto from said eastern seaboard cities is not under substantially similar circumstances and conditions as that to Chattanooga. It is further denied that the rates to Chattanooga are unjust and unreasonable in themselves.

The East Tennessee, Virginia & Georgia Railway Company, the Norfolk & Western railroad, the Central Railroad & Banking Company of Georgia and the Ocean Steamship Company of Savannah, allege that among other circumstances which justify them in charging less rates for the longer haul through Chattanooga to Memphis and Nashville than are charged to Chattanooga, is the fact that, while the transportation is through Chattanooga the rates to Memphis and Nashville from said seaboard points are made through Cincinnati. It is also claimed by some of the defendants that the through rates to Memphis and Nashville are not made under a joint prorating arrangement, but are made by adding the regular tariff rate under the official (or trunk-line) classification to Cincin-

nati to the rates of the railroads south of that point, and that for said last-named rates said roads south of Cincinnati are alone responsible.

On the part of the Nashville, Chattanooga & St. Louis Railway Company it is alleged that said company "neither owns nor operates any railroad running into Chattanooga except the one from Nashville," and said company denies that it has anything to do "in fixing the rates or participating therein on freight shipped from any of the named points to Chattanooga," but it admits "that it takes freight destined for Nashville of its codefendants at Chattanooga from said named points at through rates and participates therein with its codefendants."

The New York, Lake Erie & Western Railway Company alleges "that the freight and traffic sent by it go direct to Memphis and Nashville via Louisville, and do not pass through Chatta-
51 nooga, and, therefore, that the Board of Trade of Chattanooga has no legal ground of complaint against it under the act to regulate commerce, as it has no control whatever of the rates to Chattanooga."

The Cincinnati, New Orleans & Texas Pacific Railway Company avers that it is operating as lessee thereof the Cincinnati Southern railway, extending from Cincinnati to Chattanooga, and "that the city of Nashville is not on the defendant's line of railway and that it does not operate or control any part of any through route from said eastern seaboard points to Nashville."

The Central Railroad Company of New Jersey denies "that it makes through rates from any seaboard points named in the complaint to Chattanooga, Memphis and Nashville."

Facts.

1. The complainant is an association of merchants and manufacturers of the city of Chattanooga, Tennessee, incorporated under the laws of that State for the purposes named in the complaint, and the defendants, The East Tennessee, Virginia & Georgia Railway Company, The Norfolk & Western Railroad Company, The Old Dominion Steamship Company, The Western & Atlantic Railroad Company, The Central Railroad & Banking Company of Georgia, The Georgia Railroad Company, The Ocean Steamship Company of Savannah, The South Carolina Railway Company, The Clyde Steamship Company, The Cincinnati, New Orleans & Texas Pacific Railway Company (as lessee of the Cincinnati Southern), The Baltimore & Ohio Railroad Company, The Delaware & Hudson Canal Company, The Pennsylvania Company, The Pennsylvania Railroad Company, The New York, Lake Erie & Western Railroad Company, The New York & New England Railroad Company, and The Nashville, Chattanooga & St. Louis Railway Company, are severally common carriers engaged in interstate commerce as parts of through lines and under joint tariffs of rates to Chattanooga, Nashville and Memphis, Tennessee. There is no proof controverting the denial

of the Central Railroad Company of New Jersey that it is so engaged.

2. The following are the through rates from New York and Boston to Chattanooga, Nashville and Memphis, respectively:

Classes	1	2	3	4	5	6
To Chattanooga	114	98	86	73	60	49
To Memphis, 310 miles farther	100	85	65	45	38	35
To Nashville, 151 miles farther	91	78	60	42	36	31

52 It thus appears that the rates from New York and Boston are less to Nashville than to Chattanooga, on the six *hundred* classes respectively, by 23 cents, 20 cents, 26 cents, 31 cents, 24 cents and 18 cents; and less to Memphis than to Chattanooga by 14 cents, 13 cents, 21 cents, 28 cents, 22 cents and 14 cents. These differences prevail in favor of Nashville and Memphis on all goods transported to those cities from eastern seaboard points through Chattanooga—the distance to Nashville being 151 miles, and to Memphis 310 miles, further than to Chattanooga.

3. There are a number of routes by which traffic from the eastern seaboard is carried to Nashville. These may be separated into two classes or groups; one consisting of the lines passing through Chattanooga, the other of the lines passing through Cincinnati, Louisville, Evansville and possibly other points north of Chattanooga. How the aggregate through business to Nashville is divided between these different groups was not very definitely shown, but it is fairly inferable from the evidence that the lines through Chattanooga carry fifty to sixty per cent. of the total tonnage. There was considerable disagreement as to whether the through rate to Nashville (with reference to the routes via Cincinnati, Louisville, etc.) is prorated on the whole mileage, or made up by adding certain arbitrary amounts to the "trunk-line" rates from the East to these intermediate points respectively.

The rates from New York and Boston to Cincinnati are:

1	2	3	4	5	6
65	57	44	30	26	22

From the same points to Louisville the rates are:

1	2	3	4	5	6
75	65	50	35	30	25

And to Evansville:

1	2	3	4	5	6
83	72	55	39	33	28

The above charges are imposed for carrying the traffic to these towns respectively, whether the transportation terminates there or is continued to Nashville; in other words the lines east of these

points receive the same compensation in either case. The
53 through rate to Nashville, hereinbefore stated, is less than the local rates from these several places plus the trunk-line rates from the seaboard to each of them respectively, that is, less than the amount produced by adding the locals from Cincinnati, Louisville or Evansville to the eastern rates severally applied to those towns. For this reason the Nashville rate may be said to be made by "arbitrary" additions to the trunk-line rates to the intermediate points. On the other hand, a comparison of these additions with the distances to Nashville from the several points mentioned shows that they give substantially the same rate per ton per mile in each case—one and seven-tenths cents—as the trunk-line rate per ton per mile east of those points. Practically, therefore, the Nashville rate by the several routes now under consideration is an extension of the trunk-line rate to that point, the total charge being divided between the several carriers in nearly exact proportion to the mileage operated by each. This being the material fact, the origin of the rate, or the proper name by which to describe it, can be of no importance. As any differences between the several routes in this group appear to be insignificant, their relation to the controversy will be sufficiently shown by taking one of them as an illustration, and accordingly the route via Cincinnati will be hereafter used for that purpose.

The following comparison shows the difference between the local rate from Cincinnati to Nashville and the amounts added to the trunk-line rate to the former place to make the through rate to the latter:

	1	2	3	4	5	6
Local rate, Cin. to Nash...	53	48	39	31	25	25
	1	2	3	4	5	6
Additions to trunk-line rate to Cincinnati.	26	21	16	12	10	9

The seaboard traffic which is carried to Nashville through Chattanooga reaches the latter place by several different routes. The most important of these appears to be the East Tennessee, Virginia & Georgia railway with its eastern connections by rail and water. The water portion of this route is by the vessels of the Old Dominion Steamship Company from New York to Norfolk, where they connect with the Norfolk & Western railroad which extends to
Bristol, Tennessee, the eastern terminus of the East Tennes-
54 see, Virginia and Georgia; the rail portion of this route consists of the Pennsylvania system, and possibly other lines, reaching Roanoke, Va., on the main line of the Norfolk & Western by way of the Shenandoah valley. All traffic over this route passes through Knoxville, Tenn., the rates to which point are about the same as to Memphis.

Another route is by the Clyde Steamship Company to Charleston, connecting at that port with rail lines running through Augusta and Atlanta; and a third route is by the Ocean Steamship Com-

pany to Savannah, and thence by rail through Macon and Atlanta. There is no testimony in the case indicating the relative portion of Nashville traffic via Chattanooga which passes by either of these routes, but our understanding is that the greater portion of it goes by the one first above described.

The traffic from Atlantic seaboard points to Memphis is also divided between several independent routes. One of these general routes is by the all-rail lines through Cincinnati, Louisville, Evansville, etc. The Memphis through rate is the trunk-line rate to Cincinnati, etc., plus certain additions which are less than the local rates from those points to Memphis. The difference between such local rates and these additions appears by the following statement:

	1	2	3	4	5	6
Local rate, Cin. to Memp.....	75	60	55	40	35	30
	1	2	3	4	5	6
Additions to trunk-line rate to Cincinnati.	35	28	21	15	12	13

A comparison of these additions with the distances from Cincinnati, etc., shows that the Memphis through rate, like the Nashville through rate, is in effect an extension of the trunk-line rate to Memphis, the total charge being divided between the different carriers in proportion to their respective mileage.

A second route is the one through Chattanooga, formed by the East Tennessee, Virginia & Georgia railway with its eastern connections, and requires no further description.

Two other routes are those already mentioned by way of Charleston and Savannah respectively. The Memphis traffic by the last-named routes does not necessarily go through Chattanooga, but may take a shorter course from Atlanta by way of Birmingham.

55 In addition to these is the ocean route to New Orleans, and thence to Memphis by rail or by the Mississippi river.

There are likewise several routes by which shipments terminating at Chattanooga reach their destination. A portion of this traffic goes by the trunk lines to Cincinnati, and thence by the Cincinnati Southern railroad, now controlled by the Cincinnati, New Orleans & Texas Pacific Company. The through rate by this route, as in the case of Nashville and Memphis, is made by adding to the trunk-line rates to Cincinnati certain amounts which represent the proportion of the total charge taken by the carrier from Cincinnati to Chattanooga. The additions so made give a considerably greater rate per ton per mile for this portion of the haul than the trunk-line rate east of Cincinnati, but they are at the same time materially less than the local rates between those points. The precise difference appears by the following statement:

	1	2	3	4	5	6
Local rates, Cin. to Chat.....	76	65	57	47	40	30
	1	2	3	4	5	6
Additions to trunk-line rates to Cin.....	49	41	42	43	34	27

Another portion of the Chattanooga traffic goes by the route formed by the lines of the East Tennessee, Virginia & Georgia railway and its eastern connections by rail and water hereinbefore mentioned. The other routes by which Chattanooga shipments reach their destination are those by water and rail through Charleston and Savannah respectively which have already been sufficiently described. The proportions of the through rate taken by the several lines operating the three routes last named are not disclosed by the record; nor is there any proof showing the relative amount of Chattanooga shipments by either of the routes mentioned. Our impression, however, is that the larger portion of this traffic goes by the Cincinnati route and by the route of the East Tennessee, Virginia & Georgia railway and its connecting lines.

There may be other routes or lines by which traffic from the Atlantic seaboard reaches Nashville, Memphis or Chattanooga, but the foregoing are those by which the great bulk of eastern shipments is carried to these several points, and the only ones which need to be considered in this investigation. The rates to each of these towns are the same by whatever route the transportation is effected, except the rate to Memphis via New Orleans.

56 Cincinnati, Louisville and Evansville have water communication with Nashville by the Ohio and Cumberland rivers, and also with Memphis by the Ohio and Mississippi rivers, but no traffic from the eastern seaboard by way of Cincinnati, etc., reaches Nashville or Memphis by these water routes.

4. As the matter of distance is of considerable importance in one aspect of this case, the following tables are given, which are believed to be substantially correct:

Distances Via Cincinnati, Louisville, and Evansville.

	Miles.
New York to Cincinnati	757
Cincinnati to Nashville	295
New York to Nashville	1,052
New York to Louisville	927
Louisville to Nashville	185
New York to Nashville	1,112
New York to Evansville	986
Evansville to Nashville	157
New York to Nashville	1,143
New York to Cincinnati	757
Cincinnati to Memphis	487
New York to Memphis	1,244

New York to Louisville	927
Louisville to Memphis	377
New York to Memphis	1,304
New York to Evansville	986
Evansville to Memphis	322
New York to Memphis	1,308
57 New York to Cincinnati	757
Cincinnati to Chattanooga	335
New York to Chattanooga	1,092

Distances Via Chattanooga, All Rail.

New York to Bristol	659
Bristol to Chattanooga	242
New York to Chattanooga	901
Chattanooga to Nashville	151
New York to Nashville	1,052
New York to Chattanooga	901
Chattanooga to Memphis	310
New York to Memphis	1,211

Distances Via Chattanooga, Part Water.

Norfolk to Bristol	408
Bristol to Chattanooga	242
Norfolk to Chattanooga	650
Chattanooga to Nashville	151
Norfolk to Nashville	801
Norfolk to Chattanooga	650
Chattanooga to Memphis	310
Norfolk to Memphis	960

(This does not include water distance from New York to Norfolk.)

Charleston to Chattanooga	448
Chattanooga to Nashville	151
Charleston to Nashville	599

58	Charleston to Chattanooga	448
	Chattanooga to Memphis	310
	Charleston to Memphis	758

(This does not include water distance — New York to Charleston.)

Savannah to Atlanta	295
Atlanta to Chattanooga	140
Savannah to Chattanooga	435
Chattanooga to Nashville	151
Savannah to Nashville	586
Savannah to Chattanooga	435
Chattanooga to Memphis	310
Savannah to Memphis	745

(This does not include water distance — New York to Savannah.)

The distance from New Orleans to Memphis by rail is 394 miles, and by river very much greater.

The distance from Cincinnati to Nashville by the Ohio and Cumberland rivers is about 617 miles.

5. The city of Chattanooga is in southeastern Tennessee on the river bearing the same name as the State. During the last ten years especially its growth has been extremely rapid, and it has become a manufacturing and commercial point of considerable importance. It competes for the trade of the surrounding country largely in the same territory as Nashville, and also to some extent in the same territory as Memphis. By reason of the disparity in charges on shipments from the east, in favor of Nashville and Memphis, Chattanooga is placed at serious disadvantage in this competition and its business materially lessened. The tendency of existing rates to these rival towns is to limit the area in which eastern merchandise can be profitably distributed from Chattanooga, and to impede the growth and prosperity of that city which would naturally result from the development of its wholesale trade.

59 Under the tariffs now in force goods may be carried from the east through Chattanooga to Nashville, and back through Chattanooga to points south and east, and there sold at lower prices than Chattanooga merchants can sell for; and this appears to have actually occurred in many instances. On a carload of first-class freight, 40,000 pounds, the charges to Chattanooga, at $1.14 per hundred, amount to $456.00; while to Nashville, at 91 cents, the charges are only $364.00, making a difference of $92.00 in favor of Nashville, the longer haul by 151 miles. On fourth-class freight the advantage in favor of Nashville is $124.00 per car, and on sixth class, $72.00. The advantage in favor of Memphis, a longer haul by 310 miles, is also large.

The proportion of the Nashville through rate charged on a ton of first-class goods from Cincinnati to Nashville via the Louisville & Nashville railroad, a distance of 295 miles, is $5.20, while the proportion of the Chattanooga through rate charged from Cincinnati to Chattanooga via the Cincinnati Southern railway, a distance of 335 miles (only 40 miles further), is $9.80.

It is quite unnecessary to multiply examples showing the differences resulting from these relative rates in the transportation charges on eastern merchandise to these several towns, as their necessary effect in limiting the distance to which distribution from Chattanooga can be profitably effected is sufficiently obvious without further illustration.

6. As appear from tariffs on file with the commission, the following cities and towns, among others, are grouped with Chattanooga and take the same rail and water rates on classified traffic, to wit: Dalton, Rome, Atlanta, Americus, Athens, Columbus, Fort Gaines, and Griffin, in the State of Georgia; Huntsville, Decatur, Sheffield, Tuscumbia, Florence, Gadsden, Oxford, Talladega, Anniston, Birmingham, Opelika, Montgomery, Selma, and Eufaula, in the State of Alabama; and Enterprise and Meridian, in the State of Mississippi. Of these, Dalton, Rome, Atlanta, Americus, Athens, Columbus, Griffin, Anniston, Gadsden, Oxford, Opelika, and Eufaula have higher all-rail class rates than Chattanooga—their all-rail rates on the six numbered classes being as follows:

1	2	3	4	5	6
122	104	91	77	63	51

The rates to Chattanooga and the above-named common points, both rail and water and all rail, are established by the Southern Railway & Steamship Association, of which the defendant
60 lines herein are members, and all traffic to those points is governed by the classification of that association. The traffic to Nashville and Memphis, however, irrespective of the route by which it is transported, is governed by the official or trunk-line classification. There may be some disadvantage to Chattanooga from this circumstance, since an article of a given class under the first-named system may be in a lower class under the other system, but the injury, if any, resulting from differences of that character is not believed to be serious.

The general range of rates in the territory covered by the Southern Railway & Steamship Association is material-y higher than in the territory of the Trunk Line Association, the difference resulting mainly from the much greater volume of traffic in the latter section; and it is inevitable that difficulties should exist and complaints arise along the line of division between varying systems of classification and unlike methode of tariff construction.

7. There are no through lines by water from Cincinnati to Nashville, but a few boats are run from Cincinnati to Paducah, Kentucky, and two or three a week, carrying from six to eight car-loads each, from Paducah to Nashville. Boats are unloaded and loaded again

at Paducah. No eastern business of any consequence is done, and these water lines have no agents to solicit eastern trade. Their traffic is from Ohio River points. The Atlantic seaboard shipments to Nashville by way of Cincinnati are carried wholly by rail.

The Lower Cumberland river, on which Nashville is situated, is navigable about nine months in the year, and boats run that number of months on an average. Many years ago, before the days of railroads, there were through lines of boats to Nashville from Cincinnati and other cities, but they have all been discontinued on account of the rates and facilities afforded by the railroads. The railroads have the advantage in time, insurance and handling. If goods were shipped from the east and sent by water from Cincinnati to Nashville, they would have to be unloaded from the cars and loaded in boats at Cincinnati and loading and unloading would also be necessary at Paducah. A through line of boats was established and kept up with difficulty for some time after the war, but was long ago abandoned. The uncertainty of return cargoes from Nashville would apparently prevent the maintenance of such a line of boats at the present time, even if secured against a reduction in rates by the railroads.

8. The lower rates accepted by the carriers engaged in the
61 transportation of eastern merchandise to Nashville via Chattanooga are not forced upon them by any water competition at the former place. In performing this service for the compensation fixed by the present tariffs, these carriers are not affected by the circumstance that water communication exists between Cincinnati and Nashville. The Nashville rate is independent of the lines operating through Chattanooga, and those lines have no voice in determining its amount. That rate is made by the all-rail carriers via Cincinnati, and their action is uncontrolled by the defendant lines. The competition which the latter meet at Nashville is distinctly the competition of the trunk lines and the Louisville and Nashville system whose northern termini are at points on the Ohio river which receive trunk-line rates on eastern shipments. The competitors of the defendants for this Nashville traffic, therefore, are the railroads from the Atlantic seaboard reaching Nashville by way of Cincinnati, etc., all of which are interstate carriers subject to the act to regulate commerce. These carriers established rates and united in joint tariffs from eastern points to Nashville long before the lines through Chattanooga engaged in the Nashville business. The acceptance of the rates so fixed by the rail lines via Cincinnati was the necessary condition upon which the lines via Chattanooga could compete for Nashville traffic.

As already stated, the through rate to Nashville by the Cincinnati route is made by certain additions to the trunk-line rate from the East to the latter point. The amount of such additions was doubtless fixed originally with reference to the water rates between those cities, and it may be that the possibilities of water carriage have some influence in maintaining the present figures. But we are far from satisfied, and refuse to find on the evidence in this case, that there is any actual water competition for traffic from Atlantic points

to Nashville, or that the Louisville and Nashville road is forced to take such traffic at the compensation now received by it, because of river communication between Cincinnati and Nashville furnishing the opportunity for such competition. The river rates between those places are now considerably lower than the rail rates, and more or less of the local traffic goes by water; but the through business from Atlantic cities, saving the time, distance and cost of breaking bulk at Cincinnati, would continue to go by rail, in our judgment, even if the disparity between land and water rates were materially greater than it is now. There might, of course, be such an advance in rail rates that shipments from the East would take the water
62 route from Cincinnati. What amount of difference would produce that result it is impossible to determine from the testimony; but we find that such difference might be substantially greater than it is at present without important effect upon the railroad tonnage from the East, and that the through rate to Nashville is in no sense controlled by water competition at that point, either actually encountered or seriously apprehended.

9. The situation is quite different with respect to Memphis. The defendant lines actually meet water competition at that point which is direct and to a large degree controlling. The heavy shipments from the Atlantic seaboard to Memphis go for the most part by way of New Orleans, and the carriers complained of in this proceeding make little effort to compete with the water lines on traffic of that description. At least a third of the entire volume of eastern merchandise appears to reach Memphis by ocean steamer to New Orleans, and thence by water or rail to destination. The differences between the rates on the several classes of freight from eastern cities over the routes through Chattanooga, and the rates by ocean to New Orleans and thence by the Mississippi river to Memphis, are shown by the following table:

By defendants' lines:

	1	2	3	4	5	6
	1.00	.85	.65	.45	.38	.35
By New Orleans and river	.65	.60	.45	.33	.28	.27
Differences	.35	.25	.20	.12	.10	.08

On shipments from New York to New Orleans by ocean, and thence by rail to Memphis, the rates now in force for the several classes are 83 cents, 75 cents, 57 cents, 40 cents, 34 cents and 32 cents; also the following commodity rates, viz: on bags, bagging, soda and coffee 32 cents; on boots and shoes, dry goods, carpets, clothing and notions 68 cents; and on cotton piece goods 52 cents.

There are two steamers per week of large capacity from New York to New Orleans, and three or four lines of boats ply the Mississippi at all seasons of the year between the latter place and Memphis. Large quantities of dry goods, staple groceries and other similar

articles, which at Memphis amount to a very large tonnage, reach the wholesale dealers of that city via New Orleans at the
63 rates above stated. The rail carriers from the East cannot meet these rates and do not control this class of business. Their participation in the traffic is mainly confined to the higher grades of freight, on which the advantages in time, insurance and other items compensate for the increased cost of transportation. It appears also that The East Tennessee, Virginia & Georgia Railway, and presumably the other defendants, have agreed with the steamship lines running to New Orleans, and their connecting carriers to Memphis, upon the present differentials in favor of the New Orleans route to that destination: and the fact of such an agreement to prevent ruinous rate cutting indicates with much force the existence and positive influence of water competition for the carrying trade to that town. The apparent effect of these differentials is to give to the water routes a large share of the heavy and bulky traffic, especially the coarser and cheaper goods of general consumption at all periods of the year, while the lines operated by the defendants transport the greater portion of the more valuable commodities embraced in the higher classes.

It is possible, also, that the obtainable rates on Memphis traffic are affected, in some measure at least, if not to a controlling degree, by the tariffs made and business secured by the rail lines reaching that point through Cincinnati. The action and influence of those lines have already been described in the findings relating to Nashville, and further statements in regard thereto can hardly be required in this connection. Indeed, there seems to be no occasion for reciting other facts bearing upon transportation charges to Memphis, because the still lower rates enjoyed by Nashville, and the greater proximity of that town to Chattanooga, present the leading issue in this investigation. An equitable adjustment of the relative rates applied to these two cities will, as it now appears, make any special consideration of the Memphis tariff practically unnecessary.

10. There is a conceded margin of profit in the rates now in force to Nashville and Memphis, with reference to the additional expense incurred in carrying eastern traffic to those destinations, but whether that margin affords reasonable compensation for the services thus rendered cannot be determined from the evidence.

Conclusions.

The situation which we have thus attempted to describe is one of peculiar difficulty. It is easy to perceive the disadvantages
64 which gave rise to this complaint, but the remedy that can be applied, with due regard to the rights of the carriers affected, is not readily discovered. The prejudice to which Chattanooga is subjected by reason of the lower rates of transportation to Nashville and Memphis is obvious and conceded, but how to avoid that result without unjust consequences to the defendants is an extremely obstinate problem. There are certain considerations,

however, bearing upon this question which indicate the direction in which a solution is to be sought.

In the findings of fact above set forth, we have stated that the rates accepted for carrying eastern traffic to Nashville through Chattanooga are not influenced by water competition at the terminal point, but that the sole competition for Nashville business from the Atlantic seaboard comes from the all-rail lines reaching the same destination by way of Cincinnati. We do not see how there can be actual competition between carriers except under circumstances where the traffic for which they compete would be taken by one of them if the other were not in the field; and such competition can be controlling at a given point only to the extent that either is in a position to do the entire business if the others were unable or unwilling to engage in it. One transportation line cannot be said to meet the competition of another transportation line for the carrying trade of any particular locality, unless the latter line could and would perform the service alone if the former did not undertake it. This being so, the defendants cannot maintain that there is water competition for the carriage of eastern merchandise to Nashville, because none of that traffic would reach its destination by water if the lines through Chattanooga withdrew or were excluded from the Nashville business. Plainly, in such event, all traffic from the East to that point would be carried over the rail routes via Cincinnati; the water lines on the Ohio and Cumberland rivers would not participate in it any more than they do at present. In other words, the real competitors of the defendants for this transportation are the all-rail carriers reaching Nashville by way of Cincinnati, and those carriers are confessedly amenable to the act to regulate commerce. If these views are correct they control, *prima facie* at least, the determination of this case, for the primary question involved has been recently decided by the commission.

In a series of proceedings instituted by the Georgia railroad commission, we have taken occasion to review with much care the fourth section of the statute, familiarly known as "the long
65 and short haul clause," and have given it a construction intended to have general application.

Ga. R. R. Com. *v.* Clyde Steamship Company *et al.*, 4 Inters. Com. Rep., 120; 5 I. C. C. Rep., 324.

The consideration which this feature of the law received in the cases here referred to, and the reasons advanced for the conclusions therein announced, will appear from an examination of the report of the commission in those cases, made public a few weeks ago, and need not be repeated in this opinion. The proposition which distinctly applies to the present proceeding was stated with conciseness in the following language:

"The carrier has the right to judge in the first instance whether it is justified in making the greater charge for the shorter distance under the fourth section in all cases where the circumstances and conditions arise wholly upon its own line or through competition for the same traffic with carriers not subject to regulation under

the act to regulate commerce. In other cases, under the fourth section, the circumstances and conditions are not presumptively dissimilar, and carriers must not charge less for the longer distance except upon the order of this commission."

This ruling is directly in point and conclusive upon the primary issue in this controversy, because the competitors of these defendants for the Nashville traffic in question are themselves interstate carriers by rail, and subject in all respects to the act to regulate commerce. It follows, therefore, that the carriers herein complained of which engage in the transportation of freight from the eastern seaboard to Nashville through Chattanooga, and publish and accept rates therefor which are lower than the rates maintained by them for like transportation to Chattanooga—a shorter haul included in the longer haul to Nashville—are acting in plain violation of the fourth section, and that the resulting discrimination against Chattanooga must be adjudged unlawful.

Upon the facts ascertained in this case and the interpretation of the statute to which we adhere, any other conclusion would be quite inconsistent. The construction placed upon the long and short haul clause in the Georgia cases was deliberately adopted, and its controlling application to the present controversy is not open to serious question. We must hold that the lower rates accorded by the defendants on shipments to Nashville are without warrant of law, and that the higher charges exacted on shipments to Chattanooga cannot be sanctioned in this proceeding.

66 In justice to the various parties in interest, however, it should be added that this disposition of the case is not intended to preclude the defendants from applying to the commission for relief from the restrictions imposed by the fourth section of the act, on the ground that the situation in which they are placed with reference to this Nashville traffic constitutes one of the "special cases" to which the proviso clause of that section should be applied.

It is stated in the foregoing findings that the present Nashville rate is prescribed by the rail lines reaching that point via Cincinnati, and that the defendant lines through Chattanooga have no voice or influence in determining its amount. These lines are under compulsion, therefore, to meet the rates which other carriers have established, or leave those carriers in undisturbed possession of the entire traffic. They have no alternative but to accept the measure of compensation dictated by independent rivals, or abandon the large percentage of Nashville business which they now secure. In addition to this, the geographical position of these two cities, the diverse character and divergent courses of the several groups of lines which connect them with the Atlantic seaboard, the varying systems of classifications by which they are severally affected, and the greater volume of traffic at the lower rates prevailing in the trunk-line territory, are existing conditions which govern, to some degree at least, the transportation in question. For these conditions the carriers complained of do not appear chiefly responsible, because the lower rate to Nashville is beyond their control, and the

allowance of the same rate to the shorter-distance point might reduce their revenues below the limits of fair compensation. Without in any sense prejudging the case, we hold that the defendants may invoke its consideration in an appropriate proceeding.

Any such intimation, however, should not be understood as covering an implied indorsement of the present disparity in rates as between Chattanooga and Nashville, for no such inference is intended. The suggestion here made goes no further than the propriety of an unprejudiced investigation, when permission to deviate from the general rule of the statute is applied for by these carriers on account of the special circumstances by which they are surrounded.

It seems improbable that the discrimination complained of can be made less oppressive by any increase in the Nashville
67 rate, and on that assumption the only practical relief is a reduction in rates to Chattanooga. We are aware of the difficulties attending a readjustment upon that basis, but we cannot regard them insuperable. On the contrary, we firmly believe that the eastern rate to this point can be materially reduced without injustice to the defendants and without serious disturbance to the general scheme of tariff construction with which that rate is connected. Compared with rates to other points and on other lines, for similar distances and a corresponding volume of traffic, the rate to Chattanooga seems extremely liberal, to say the least; while a strong presumption of its unreasonableness is created by the voluntary action of the defendants themselves in seeking business at decidedly lower rates to points much more remote. When these carriers, for instance, charge seventy-three cents per hundred pounds on fourth-class freight from New York to Chattanooga, and at the same time carry like shipments 150 miles further to Nashville for forty-two cents a hundred, and do this not incidentally but for a series of years, the belief that the higher rate is excessive becomes a positive conviction. We are familiar with the argument by which the policy of lower rates to competitive points is defended, and concede its conclusiveness in certain cases and within certain limits; but when the disparity between long and short distance charges reaches the proportions here exhibited, the inference is irresistible that the lesser rate must be unremunerative upon any theory, or else the larger rate gives an unwarranted return for the services rendered. As the commission has said in another case where a similar question was considered, "the difference between the figures is too great to permit the lower charge to be justified by the rule of expediency without condemning the higher charge by the rule of reasonable compensation."

We entertain little doubt, therefore, that equity between shipper and carrier requires some reduction in the rates now enforced on Chattanooga traffic from Atlantic points, and are convinced of the necessity for such a reduction to secure relative justice between that town and Nashville. We refrain from further statement of the reasons which have induced this conclusion, as the amount to which the Chattanooga rate should be reduced will not now be decided.

If the carriers engaged in Nashville transportation through Chattanooga act upon the suggestion above made, and apply for relief from the restrictive rule laid down in the fourth section, the subject can be more fully considered in disposing of that application; while, if such action is not taken by them within the time allowed for that purpose, it will be the duty of the commission to make a final order in this proceeding prohibiting higher charges on shipments to Chattanooga than are or may be accepted on like shipments to Nashville. In addition to this, it may be remarked that the complainant's case was presented on the theory that the prohibitive requirement of the statute should be strictly enforced against these defendants, while they in turn contended that the full difference now maintained between rates to Chattanooga and to Nashville was justified by the necessities of the situation. The question which may arise, if permission is sought to depart from the general rule relating to long and short hauls, was not specially discussed. On this ground, also, it would seem suitable to allow opportunity for a further hearing before fixing maximum rates on shipments to Chattanooga.

68

We deem it unnecessary to make any comment upon the rates in force at Memphis or give any directions in respect thereto, because, as stated in the findings, the fundamental question in this case arises between Chattanooga and Nashville, and an equitable adjustment of rates between those towns may obviate any separate consideration of the Memphis tariff.

These views lead to the following order:

For reasons stated in the foregoing opinion, it is adjudged unlawful for the defendants herein to make or accept rates on shipments from Atlantic seaboard points to Nashville through Chattanooga, which are lower than the rates made and enforced by them at the same time on like shipments to Chattanooga—a shorter distance included in the longer distance to Nashville. The defendants, therefore, are ordered and required to cease and desist from making, enforcing or receiving any higher rates for such transportation as aforesaid to Chattanooga than are or may be made or accepted by them at the same time for like transportation to Nashville.

To enable the defendants to apply for relief under the proviso clause of the fourth section of the act to regulate commerce, this order will be suspended until the first day of February, 1893; but the same will take effect and be in force from and after that date unless such application be made prior thereto. In case such relief shall be applied for within the time mentioned, the question of further suspending this order until the hearing and determination of such application will be duly considered.

In this report and opinion all the commissioners concur.

69 EXHIBIT R.

At a session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 30th day of December, A. D. 1892.

Present: Hon. William R. Morrison, chairman; Hon. Wheelock G. Veazey, Hon. Martin A. Knapp, Hon. James W. McDill, Hon. Judson C. Clements, commissioners.

THE BOARD OF TRADE OF CHATTANOOGA
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY, The Norfolk and Western Railroad Company, The Old Dominion Steamship Company, The Western and Atlantic Railroad Company, The Central Railroad and Banking Company of Georgia, The Georgia Railroad Company, The Ocean Steamship Company of Savannah, The South Carolina Railway Company, The Clyde Steamship Company, The Cincinnati, New Orleans and Texas Pacific Railway Company, The Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, The Nashville, Chattanooga and St. Louis Railway Company, The Pennsylvania Railroad Company, The Pennsylvania Company, The New York, Lake Erie and Western Railroad Company, The New York and New England Railroad Company, and The Delaware and Hudson Canal Company.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and the commission having, on the date hereof, made and filed a report and opinion containing its findings of fact and conclusions thereon, which said report and opinion is hereby referred to and made a part of this order, and the commission having, as appears by
70 said report and opinion, found and decided, among other things, that such of the defendants herein as are engaged in the transportation of property from New York and other Atlantic seaboard cities to Chattanooga or through Chattanooga to Nashville, both in the State of Tennessee, have, by charging and receiving more for the transportation of like kind of property from New York, Boston, Philadelphia, Baltimore, and other Atlantic seaboard cities for the shorter distance to Chattanooga than for the longer distance over the same lines in the same direction to Nashville, violated the provisions of the act to regulate commerce.

It is ordered and adjudged that the defendants, The East Tennessee, Virginia and Georgia Railway Company; The Norfolk and Western Railroad Company; The Old Dominion Steamship Company; The Western and Atlantic Railroad Company; The Central Railroad and Banking Company of Georgia; The Georgia Railroad Company; The Ocean Steamship Company of Savannah; The South Carolina Railway Company; The Clyde Steamship Company; The Cincinnati, New Orleans and Texas Pacific Railway Company; The Baltimore and

Ohio Railroad Company; The Central Railroad Company of New Jersey; The Nashville, Chattanooga and St. Louis Railway Company; The Pennsylvania Railroad Company; The Pennsylvania Company; The New York, Lake Erie and Western Railroad Company; The New York and New England Railroad Company, and The Delaware and Hudson Canal Company, or such of them as are or may be engaged in the transportation of property from New York and other Atlantic seaboard points to Chattanooga or through Chattanooga to Nashville, in the State of Tennessee, be and they severally are hereby required to cease and desist from charging or receiving any greater compensation in the aggregate for the transportation of like kind of property from New York, Boston, Philadelphia, Baltimore, or other Atlantic seaboard cities for the shorter distance to Chattanooga than for the longer distance over the same line in the same direction to Nashville. That for the purpose of enabling said defendants to apply to the commission for relief under the proviso clause of the fourth section of the act to regulate commerce, this order is hereby suspended until the first day of February, 1893; but the same will take effect and be in force from and after that date unless such application be made prior thereto. In case such relief shall be applied for within the time mentioned the question of further suspending this order until the hearing and determination of such application will be duly considered.

71 And it is further ordered that a notice embodying this order be forthwith sent to each of the defendant corporations, together with a copy of the report and opinion of the commission herein, in conformity with the provisions of the fifteenth section of the act to regulate commerce.

Office of the Interstate Commerce Commission.

WASHINGTON, D. C.

I, Edw. A. Moseley, secretary of the Interstate Commerce Commission, hereby certify that the foregoing exhibits, seventeen in number, and marked A to R, both inclusive, are correct copies of the originals thereof on file among the records of the Interstate Commerce Commission.

In testimony whereof I hereunto set my hand and affix the seal of the said Interstate Commerce Commission, at the city of Washington, in the District of Columbia, this 6th of March, 1893.

[L. S.] EDW. A. MOSELEY,
Secretary of the Interstate Commerce Commission.

A true copy of the petition and exhibits.

____ ____,
Secretary of the Interstate Commerce Commission.

(Endorsed:) Filed 1893, Mar. 24. Henry O. Ewing, deputy clerk.

And on the same day, to wit, the 24th day of March, 1893, an entry was made upon the journal of said court, which said entry is clothed in the words and figures following, to wit:

Journal "C," page 365, March 24th, 1893.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY Company *et al.* } No. 384.

Came H. M. Wiltse, assistant district attorney of the United States, and presented the petition of the Interstate Commerce Commission against the defendants, and asked leave to file the same and the application was granted. And it appearing from said petition that pursuant to law upon complaint of the Board of Trade of Chattanooga, Tennessee, the commission aforesaid investigated charges against the defendants for violations of the interstate-commerce laws, and upon investigation defendants were found guilty of violations of said laws, and were ordered and notified to desist from said violations, but the order was suspended until the first day of February, 1893, but was to take effect and be in force from and after that date unless the order should be changed upon application of defendants, and it being alleged that said order remains in full force and effect, and has not been complied with, but has been disregarded,

72

It is therefore ordered that a subpœna issue requiring the defendants and each of them to appear before this court when sitting in Chattanooga aforesaid on the second Monday of April, 1893, and let such subpœna and a copy of this order and the petition be served on the defendants and let them then and there show cause why an injunction shall not issue as prayed for. Let process as to defendants outside of this district be sent to the marshal of the district in which the chief office of the respective defendants *are* situated and be served upon the chief officer to be found by such marshal, at the defendants' chief office. If said defendants or any of them fail to appear and make defence to the petition after such service, within three days after the second Monday of April, next, the petition will be taken for confessed and heard *ex parte* as to them.

And afterwards, to wit, on the 10th day of April, 1893, the answer of the C., N. O. & T. P. R'y Co. was filed in said court, which said answer is clothed in the words and figures following, to wit:

Answer, C., N. O. & T. P. Ry Co.

(Endorsed:) Filed Apr. 10, 1893. Henry O. Ewing, Deputy Clerk.

Circuit Court of the United States, Eastern District of Tennessee, Southern Division.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA & GEORGIA Railway Company and Others.
} In Equity. No. 384.

Separate answer of the Cincinnati, New Orleans & Texas Pacific Railway Company.

73 This defendant, answering for itself and not for any other of the defendants herein, says that it admits that it is a corporation created, chartered and existing under and by virtue of the laws of the State of Ohio and having its principal office at Cincinnati in said State, and it says that it has no knowledge as to the corporate existence and character of the several companies made defendants to this proceeding other than itself, and therefore demands strict proof thereof.

2. Defendant says that it is a common carrier operating, as lessee thereof, a railway, known as the Cincinnati Southern Railway, extending from the city of Cincinnati, in the State of Ohio, through the States of Kentucky and Tennessee, to the city of Chattanooga, Tennessee.

Defendant admits that it is a common carrier and is concerned in the transportation of passengers and property by railroad and water from seaboard points in the States of Massachusetts, New York, Pennsylvania and Maryland to points in the State of Tennessee in the capacity of an intermediate connecting carrier over its line of railway above described.

4. Defendant admits that it is, conjointly with the defendants parties hereto, transporting property and participating in through rates of freight charges therefor from the points designated as eastern seaboard points, viz: Boston, New York, Philadelphia and Baltimore, to the cities of Memphis and Chattanooga, Tenn., but not to the city of Nashville, Tenn.; but that the city of Nashville, Tenn., is not on defendant's line of railway, nor does defendant operate or control any part of any through route from the aforesaid eastern seaboard points to said Nashville. Defendant admits that the through rates aforesaid are lower for the transportation of like property from said eastern seaboard points to the city of Memphis than to the city of Chattanooga, but it denies that the circumstances are the same or substantially the same under which said transportation to said cities is conducted.

5. Defendant admits that it participates in the transportation of property shipped at eastern seaboard points to the cities of Memphis and Chattanooga and that such property is in a few instances trans-

ported through the city of Chattanooga to the city of Memphis, but it says that the charges for transporting said property, so far as its participation therein is concerned, is determined and controlled by the fact that between Cincinnati, Ohio, at which point defendant's connection with such transportation begins, and the said city
74 of Memphis, Tenn., there extends a water route, along the Ohio and Mississippi rivers, over which, at all seasons of the year, the business of transporting such property is carried on by a relatively cheap and inexpensive method, which fixes the rate which must be accepted by all railroads doing business between said Cincinnati and Memphis, which said rates are much below what would be a fair and reasonable compensation for such services by rail, and if applied to points not favored by nature with water routes, would prove ruinously inadequate to the cost of the service performed.

6. Defendant says that the rates from said eastern seaboard points to said Chattanooga are not unreasonable and unjust in themselves and do not subject said city of Chattanooga to any undue or unreasonable prejudice or disadvantage.

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY,
By JUDSON HARMON AND
LEWIS SHEPHERD, *Its Attorneys.*

STATE OF OHIO, *Hamilton County,* } *ss:*

Before me, Charles M. Cist, a notary public in and for said county and State, personally appeared S. M. Felton, president of The Cincinnati, New Orleans and Texas Pacific Railway Company, one of the defendants in the above case, who, being duly sworn, deposes and says that the facts set forth in the foregoing answer are true as he verily believes.

S. M. FELTON, *President.*

Sworn to and subscribed in my presence this 7th day of April, 1893.

[SEAL.]

CHARLES M. CIST,
Notary Public, Hamilton Co., Ohio.

And on the same day, to wit, the 10th day of April, 1893, an entry was made upon the journal of said court, which said entry is clothed in the words and figures following, to wit:

75 Journal "C," page 411.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENN., VA. & GA. R'Y CO. ET AL.

In this cause by consent it is ordered that each of the def'ts served with notice be allowed until 1st Monday in May next to make de-

fence, and that on the hearing of this cause either party may use such parts of the testimony taken before the Interstate Commerce Commission as may be desired, without retaking the same.

And afterwards, to wit, on the 24th day of April, 1893, a certain plea was filed by the Delaware and Hudson Canal Company; which said plea is clothed in the words and figures following, to wit:

Plea of the Delaware & Hudson Canal Company.

(Endorsed:) Filed April 24, 1893. Henry O. Ewing, Deputy Clerk.

In the Circuit Court of the United States for the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION *vs.* THE EAST TENNESSEE, VIRGINIA AND GEORGIA Railway Company and The Delaware and Hudson Canal Company, Impleaded with Others.	In Equity. No. 384.

The plea of the defendant, The President, Managers and Company of the Delaware and Hudson Canal Company, impleaded as the Delaware and Hudson Canal Company, to the petition of the above-named petitioner, this defendant appearing solely for the purpose of filing this plea to the jurisdiction of this court.

76 The defendant, The President, Managers and Company of the Delaware and Hudson Canal Company, by protestation, not confessing or acknowledging all or any part of the matters and things in the said petition mentioned to be true in such manner and form as the same are therein set forth and alleged, does plead thereto, and for plea says that—

At the time of the beginning of this suit, this defendant was and still is a corporation duly incorporated and existing under and by virtue of the statutes of the State of New York and of no other State; and this defendant then was not and is not now an inhabitant of the eastern district of Tennessee.

At the time of the beginning of this suit and ever since, this defendant was and still is located and had and still has its principal office in the city, county and State of New York, and not elsewhere, and then had and now has no office whatsoever within the eastern district of Tennessee. No violation or disobedience upon the part of this defendant of the order or requirement in that behalf alleged in the petition or of any order or requirement whatsoever of the petitioner has ever happened within the eastern district of Tennessee.

This honorable court is, therefore, without jurisdiction either of the person of this defendant or of the subject-matter set forth in the petition herein, so far as the same relates to this defendant.

All which matters and things this defendant avers to be true and pleads the same to the said petition and humbly craves the judgment of this honorable court whether it ought to be compelled to make any further or other answer to the said bill.

THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY,

[SEAL.] By R. M. OLIPHANT, *President.*

LEWIS SHEPHERD,

Solicitor and of Counsel for Defendant, The President, Managers and Company of the Delaware and Hudson Canal Company.

I hereby certify that the foregoing plea is in my opinion well founded in point of law.

Chattanooga, April 24, 1893.

B. H. BRISTOW.
LEWIS SHEPHERD.

77 UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

R. M. Oliphant, being duly sworn, says that he is the president of the above-named defendant, The President, Managers and Company of the Delaware and Hudson Canal Company, and that the above plea is true in point of fact, and is not interposed for delay.

R. M. OLIPHANT.

Sworn to before me, this 19th day of April, 1893.

[SEAL.] LIVINGSTON CROSBY,
Notary Public, N. Y. County.

And afterwards, to wit, on the 4th day of May, 1893, the answer of the E. T., V. & Ga. R'y Co. was filed in said cause, which said answer is clothed in the words and figures following, to wit:

Answer E. T., V. & Ga. R'y Co.

(Endorsed:) Filed 4 Day of May, 1893. Henry O. Ewing, Deputy Clerk.

Answer of the East Tennessee, Virginia & Georgia Railway Company to the bill of complaint filed in the circuit court of the United States for the eastern district of Tennessee, at Chattanooga, Tennessee, it being No. 384 on the equity docket, in the case of the Interstate Commerce Commission against said defendant and others.

I.

Respondent admits that it operated and did business as a common carrier by the name and style as above stated, as the successor in business of the East Tennessee, Virginia & Georgia Railroad Com-

pany, which was a charter created and existed under and by virtue of the laws of the State of Tennessee; and that it had its principal office at Knoxville, in said State.

Respondent believes it to be true that the allegations of the bill touching the incorporation of the other defendants to the bill are as stated therein, but do- not admit the same, as it has no definite knowledge thereof save public rumor and the averments in said bill contained, and where the same may be material to the rights of this respondent, the complainant is held to plenary proof in regard thereto. Neither does this respondent know, save as above recited, what acts or omissions were done by either of the other said
78 defendants as recited in the bill, which are claimed to have been in violation of law, and the complainant will be held to plenary proof of the same.

Respondent, answering for itself, says that on the 9th day of April, 1890, and up to the 24th day of June, 1892, it was as a common carrier engaged in the transportation of persons and property from Bristol, Tennessee, to Chattanooga, and westward to Memphis. On last-mentioned day, upon proper pleadings thereunto had, this honorable court, sitting in equity at Knoxville, Tennessee, appointed Charles M. McGhee and Henry Fink as receivers of the property of this defendant on the petition of Samuel Thomas, in case No. — in equity, and afterwards in two cases numbered, respectively, Nos. — and —, filed by the Central Trust Company of New York, extension orders were granted by virtue of all which all the franchises, properties and assets of this defendant were taken from it, and placed into the care and keeping of said receivers, who have since said date been in actual charge and operation of said properties as common carriers, and this defendant has had no possession nor connection therewith.

Respondent denies that there was, on the 9th day of April, 1890, or is now, any common control, management or arrangement between this respondent and any of its codefendants for the continuous carriage or shipment by its or other railroads or lines and steamers beyond what is usual and necessary in the handling of freights and passengers, by means of through tickets and bills-lading. As to whether any such common control, management or arrangement exists between any of the other defendants to the petition, respondent has no information, knowledge or belief.

II.

Respondent admits that on or about April 9th, 1890, an association styling itself the Board of Trade of Chattanooga, and claiming to be a mercantile society duly incorporated under the laws of Tennessee, and claiming to have its principal office at Chattanooga, in said State, filed a petition before the Interstate Commerce Commission for an alleged violation on the part of this defendant and others of the provisions of the act to regulate commerce, and that Exhibit A to the petition filed in this case is a true copy of said petition, and respondent admits that a true copy of said petition was forwarded

to respondent; but this respondent is further informed and
79 believes that said petitioner has no longer any entity at law, but has become disorganized, disintegrated and has been absorbed by another and entirely different body which is attempting to use its former functions.

III.

This respondent is content to admit it to be true that Exhibits B, C, D, E, F, G, H, I, K, L, O and P to the petition filed in this case are true copies of the answers of the respective defendants, as alleged in the petition filed in this case.

IV.

Respondent admits it appeared before said commission by answer, and presumes the facts as to appearance by other defendants are correctly set forth in the recitals of the bill and exhibits thereto.

V.

This respondent denies that it was made to appear to the satisfaction of said commission at said alleged hearing that this respondent had violated any of the provisions of the act to regulate commerce in any respect whatever, either as alleged in the original petition or otherwise. This respondent insists that the conclusions *to* which the said commission arrived at were wrong, deductions from the evidence submitted to them and contrary to the law of the land. It further insists that there is much material evidence pertinent to the case which was not before said commission at said hearing, and which, when presented, would show more clearly that said conclusions were erroneous, null and void. Respondent further explicitly denies that it ever violated any of the provisions of said act, as it will fully prove at the hearing in this case.

Respondent further denies that said commission duly or legally determined the matters or things that were in controversy or at issue between said parties, even upon the evidence at that time adduced. On the contrary, respondent is advised and so insists that such determination of said matters and things as was made by said commission was erroneous, illegal and void.

VI.

Respondent denies that it has at any time been unmindful of its duty or of any lawful decision or determination of said commission, or that it has ever disregarded or set at naught any
80 lawful order or authority of said commission, or that it has ever willfully or knowingly or at all violated or disobeyed any lawful order of said commission.

VII.

This respondent admits that prior to April 9th, 1890, and up to the 24th day of June, 1892, it has participated in making and receiving lower rates for the transportation of property from Boston,

in the State of Massachusetts: New York, Philadelphia, Baltimore and other eastern seaboard cities through Chattanooga to Nashville than have been made and accepted by it and some of its codefendants during the same time for the transportation of like property from said cities to Chattanooga. Respondent admits that such property has been transported by the same steamships and over the same railroads in the same direction, and that the rates to Nashville from said eastern seaboard cities have been less than the rates from said eastern seaboard cities to Chattanooga, and that the distance via said steamships and railroads is less to Chattanooga than to Nashville, but notwithstanding said facts are true, respondent denies that it has been guilty of any violation of the 4th section of the act to regulate commerce, because it says that the transportation of such property from said eastern seaboard cities to Nashville has not been and is not conducted under "substantially similar circumstances and conditions" as the transportation of like property from said eastern seaboard cities via said steamships and railroads to Chattanooga, for the following reasons, namely:

a. There are certain steamships and sailing vessels which ply between said eastern seaboard cities and New Orleans, Louisiana, and certain steamships and barges which ply from New Orleans to Paducah, Kentucky, and beyond; and certain other steamboats which ply from Paducah to Nashville, Tennessee, thus forming lines of all-water transportation from said eastern seaboard cities to Nashville of material and controlling effect, and that rates of freight can be obtained by said lines of water transportation from said eastern seaboard cities to Nashville, which prevent the all-rail rates from said eastern seaboard cities to Nashville being materially increased above what they are at present, and stand as a continual check to any effort to raise the same.

b. Lines of steamships ply between said eastern seaboard cities and Newport News and Norfolk, Virginia; the Chesapeake
81 & Ohio railroad extends from Newport News to Cincinnati, Ohio, and Louisville, Kentucky; and the Norfolk & Western railroad extends from Norfolk to Norton, Kentucky, where it connects with the Louisville & Nashville railroad, which extends from Norton to Cincinnati and Louisville. That said last-mentioned steamship and railroads concede lower rates from said eastern seaboard cities to Cincinnati and Louisville, respectively, than can be obtained by any all-rail lines or any other known part-rail and part-water lines, and they concede such rates to Cincinnati and Louisville from said eastern seaboard cities as, added to prevailing rates from Cincinnati and Louisville to Nashville, render it impossible to materially increase the all-rail rates from said eastern seaboard cities to Nashville above the present rates, and constitute another uncontrollable check against the raise of the present rates to Nashville over the line of this defendant.

c. The New York Central and Erie railroad, the Pennsylvania railroad and the Baltimore & Ohio railroad, which are known as the trunk lines, and which extend from the said eastern seaboard cities to Cincinnati and Louisville, concede such rates from said

eastern seaboard cities to Cincinnati and Louisville, as added to prevailing rates from Cincinnati and Louisville, makes it impossible to materially increase the all-rail rates from said eastern seaboard cities to Nashville above what they now are, which is another effective check as against raising the rates over the lines of this respondent, unadjusted and uncontrolled by this respondent.

d. Certain steamboats ply between Cincinnati and Louisville on the one side, and Evansville, Indiana, and Paducah, Kentucky, and other points beyond, on the other side; and certain lines of steamboats ply from Paducah, Kentucky, to Nashville, Tennessee. There is also a line of boats plying between Evansville and Nashville direct, and such rates can be obtained by said steamboat lines from Cincinnati and Louisville on the one side to Nashville, on the other side as render it impossible to increase the all-rail rate from Cincinnati and Louisville on the one side to Nashville on the other side materially above what they are at present, which is another check not made by this defendant, nor can they be controlled by it.

Respondent avers that there are no regular lines of water transportation from said eastern seaboard cities to Chattanooga, and no competition by water between said eastern seaboard cities and Chattanooga, by means of which the said city of Chatta-
82 nooga is not a competitive point in the sense in which Nashville by her natural situation is. Respondent avers that the rates from said eastern seaboard cities to Chattanooga are the result of many competitive factors; have been arrived at by healthful competition between divers independent lines, the result of the current of commerce of many years standing; are entirely beyond the control or influence of this respondent; have never been complained of by any of the parties in interest, and are just and reasonable in and of themselves.

Respondent avers that said rates are just and reasonable as compared with the rates from said eastern seaboard cities to Atlanta and other cities located in the same section as Chattanooga.

Respondent further shows to the court that the railroad lines of the South differ from the trunk lines of the North so far as revenue is concerned in many particulars—notably in the fact that it is impossible to derive recompense for the service from their local work without charging for the same extraordinary prices. They are located in a sparsely settled country, where factories are few; where merchandise is not created; where mines are not widely distributed, and where agriculture has not been stimulated to the degree it has in the northern section; and where the whole country is more or less cut into and bisected by water navigation, which obtains more or less during the whole of the year. It will be found impossible to adjudicate what will be fair and reasonable upon the common carriers on the one hand and the people upon the other, not to keep in view those circumstances which are diverse from those of other sections of the United States. The same rules will not apply to all sections alike. Some trunk lines *it* may be able to carry local freight as cheaply as they do their through freight, because local freight is offered in such abundance as to create a sufficient

revenue for them. But on the line of this defendant, it shows to the court that it will be impossible to derive sufficient revenue for its maintenance from local freight without charging exorbitant prices for the same, and to enable it to carry its local freight such as to Chattanooga, as is involved in this case, at reasonable prices for those persons compelled to have transportation, it is compelled to rely upon the additional revenue obtainable through the through traffic. It does not depend primarily upon its through traffic as to Nashville as is complained of in this case, for its maintenance, because at the rates at which it is compelled to do that service for the prices obtainable, it would be utterly unable to maintain its
83 expense; but because local points such as Chattanooga and other cities are unable to furnish a sufficient amount of local freight to enjoy the whole of the service of this respondent, it is compelled to accept through freight at a less price by which means it is able to carry its local freight to Chattanooga and other points at a less rate than it otherwise would be enabled to do. In the hot competition both north and south of it, this respondent has done the most favorable work possible for its patrons at the present charges, the result of which has been that it was utterly unable to pay its fixed charges and expenses and pay anything as interest upon its investment. If this honorable court should hold that the charges to Chattanooga should be no higher than those to Nashville, it not only would be a loss of revenue to this respondent for that particular station but would change and disrupt the charges throughout the whole contiguous region as far east as Bristol, and southwest to Rome, Birmingham and Atlanta, and would be a direction to the receivers aforesaid, or any one who should operate the line of road, to do so at a dead cost and ruinous losses. To compel them to raise the rates of freight to Nashville would simply result in an order to this defendant, or to any one operating the lines of railway, to retire from that business and to lose the little revenue that it has eked out from that source, and to compel a rise in the charges upon freight destined to Chattanooga and all such places likewise involved.

The end sought by the petitioner to wit: that the Nashville merchants should be compelled to pay higher freight charges than they are now paying, could not be attained by any such adjudication of this court. The traffic would simply be deflected to the other lines of common carriers over which neither this defendant nor the honorable court has control.

Respondent avers that the rates from the said eastern seaboard cities to Chattanooga are the same as the rates from said eastern seaboard cities to Anniston, Alabama; Athens, Georgia; Atlanta, Georgia; Birmingham, Alabama; Cedartown, Georgia; Columbus, Georgia; Dalton, Georgia; Montgomery, Alabama; Eufaula, Alabama; Rome, Georgia; Selma, Alabama; Meridian, Mississippi; Opelika, Alabama; and Talladega, Alabama. It further shows that rates, dependent upon the same principle, obtain to Knoxville, to Morristown, to Jonesboro and to Bristol, and respondent insists that it would not be just and reasonable to reduce the rates from said

eastern seaboard cities to Chattanooga unless said rates were also reduced from said eastern seaboard cities to the other above-
84 mentioned cities; and none of said cities were represented before the Interstate Commerce Commission, nor are they before the court in this case, nor do they make any complaint in that behalf.

Respondent avers that the rates charged from said eastern seaboard cities to Chattanooga and to Nashville respectively do not constitute any unjust discrimination or undue preference in favor of Nashville as against Chattanooga. The rates from said eastern seaboard cities to Cincinnati, Louisville and Evansville are lower than from said eastern seaboard cities to Nashville upon freight transported from said eastern seaboard cities through Chattanooga to Nashville and thence to Cincinnati, Louisville and Evansville, the distance is less from said eastern seaboard cities via that route to Nashville than Cincinnati, Louisville and Evansville.

The rates from said eastern seaboard cities to Cincinnati, Louisville and Evansville are made by the trunk-line roads above referred to, which do not transport through Chattanooga and which therefore would not be subject to the operation of the 4th section of the act to regulate commerce so far as traffic passing from said eastern seaboard cities through Chattanooga to Ohio River points is concerned. It would therefore be unjust and unreasonable to force defendant to raise the rates from said eastern seaboard cities to Nashville via Chattanooga and thus increase the disadvantages under which Nashville labors as compared with cities located upon the Ohio river, unless the rates from said eastern seaboard cities to said cities upon the Ohio river were also raised.

Further answering, this respondent says that complaint is made that the merchants of Chattanooga meet the competitive trade by the merchants of Nashville in the region intermediate between the two cities. This respondent is advised that a very small portion of the trade of Chattanooga is involved in that region, and this respondent cannot be held responsible to do away with the natural advantages which one city may have over another. Whenever Nashville merchants attempt to sell goods north or west, or to the upper or lower Cumberland river, they meet active competition from the merchants of Cincinnati, Louisville, Evansville, and other Ohio River cities, including even St. Louis, Missouri. So also as this respondent believes, the Knoxville merchants extend their wholesale trade down to, over and beyond the region of Chattanoga and successfully compete with Chattanooga merchants in the region between Nashville and Chattanooga, although they are sub-
85 jected to more expense than are the merchants of Chattanooga. These matters of trade must be left to healthful competition among themselves, and cannot be adjusted by a common carrier.

Said trunk-line rates from said eastern seaboard cities to Cincinnati, Louisville and other Ohio — cities are made relative to the rates which obtain between said eastern seaboard cities and Chicago, and the rates which obtain between said eastern seaboard cities and

Chicago are controlled by the all-water line via the lakes, canals and the Hudson river, which extend from Chicago to New York. It would be practically impossible to increase the rates between said eastern seaboard cities and Cincinnati, Louisville and other Ohio River cities without increasing in the same proportion the rates from said eastern seaboard cities to Chicago, and said rates would be materially increased from said eastern seaboard cities to Chicago above the rates which obtain by the water line aforesaid.

This respondent objects to the effect of this competition upon the low rates of carriage of the traffic to Nashville as much as the petitioner could possibly do, and would be happy if the petitioner or this honorable court could find a way by which the Nashville merchants could be compelled to pay this respondent higher prices for that service, in which event they would be enabled to carry their local freight at lower rates, but they state that they have a line of railway which is well located, which is now being economically run under the orders of this honorable court, and which at present rates is utterly incapable of paying anything like a legal rate of interest upon the actual value of the property.

Respondent states that every allegation in the said bill not herein specifically admitted nor modified is expressly denied, and full proof is demanded of the same.

And now having fully answered, this respondent prays to be hence dismissed with reasonable costs in this case most unjustly incurred.

THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY CO.
W. A. HENDERSON, *Solicitor.*

And on the same day, to wit, the 4th day of May, A. D. 1893, the answer of the Pennsylvania R. R. was filed in the clerk's office of said court, which said answer is clothed in the words and figures following, to wit:

Answer of Pennsylvania R. R. Co.

(Endorsed:) Filed 4th Day of May, 1893. Henry O. Ewing, Deputy Clerk.

86 In the Circuit Court of the United States, Southern Division of the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA AND Georgia Railway Company, The Pennsylvania Railway Company, *et al.* } In Equity. No. 384.

The answer of the Pennsylvania Railroad Company to the petition filed in the above-stated case.

This defendant, appearing to the said petition under and pursuant to the order of your honorable court made on the twenty-fourth

day of March, 1893, served upon it in the city of Philadelphia on the first day of April, 1893, most respectfully, protesting, states that its principal office not being situate in the judicial district of the circuit court of the United States for the eastern district of Tennessee; nor the alleged violation or disobedience by it of the order of the Interstate Commerce Commission referred to in said petition, happening within the judicial district of the circuit court of the United States for the eastern district of Tennessee, the petitioner was not authorized under the act to regulate commerce as amended to file its petition as against this defendant in this court.

Wherefore, without more, this defendant prays that the said petition shall as to it be dismissed.

This defendant, likewise protesting against the said petition, excepts thereto because it says that said petition does not set out with sufficient certainty the charge or charges made against the said defendants, or against this defendant, nor the fact or facts relied on, and on which the same are founded; and further, in that the proceedings had and taken by and before the Interstate Commerce Commission are not well and sufficiently pleaded, nor pleaded according to their legal effect, nor so as to disclose with reasonable certainty what the said defendants, or this defendant, were or was required to do and observe thereunder.

Wherefore, without more, this defendant prays that said petition shall as to it be dismissed.

And this defendant, without conceding the jurisdiction of your honorable court, or waiving the foregoing plea, protests, ex-
87 ceptions, and prayers for dismissal of this petition as to this defendant, but expressly reserving to itself all rights, benefits, and advantages resulting therefrom as fully as if it had rested solely thereon, for answer to said petition saith:

1st. That the proportion of the through rate received by it for carriage over its line of the traffic which is the subject-matter of complaint, is just and reasonable, and, as it is advised, is not in violation of the act to regulate commerce.

2nd. This defendant avers that the conclusions of the said plaintiff commission were not justified by the law or the facts because, *inter alia*, of the character of the service and the facts and circumstances which are in large part set out and disclosed in the answers to the original complaint attached as exhibits to the petition filed in this case, and particularly exhibits marked C, D, E, F, I, K and M, and reference is hereby made to said exhibits with like force and effect as if the contents of said exhibits were in form or in substance herein fully set out and recited.

3rd. This defendant avers that the proportions of the rates received by it for such traffic were much less than this defendant is authorized by its charter grants to charge for the services rendered.

4th. This defendant is advised, and therefore avers, that the act entitled "An act to regulate commerce," does not authorize the commission, under such circumstances as were presented to it by the complaint and answers filed and by the evidence taken thereunder, to determine and find that rates such as were received by this de-

fendant under the circumstances as they were disclosed, were in violation of said act.

Wherefore, this defendant prays that the petition in this case may be dismissed as to it, not only for want of jurisdiction, and because of defective petition as hereinbefore prayed for, but also for lack of just foundation for relief in fact and in law.

Witness the corporate seal of said The Pennsylvania Railroad Company, hereto attached, duly attested, this seventh day of April, anno Domini, one thousand eight hundred and ninety-three.

THE PENNSYLVANIA RAILROAD COMPANY,
By FRANK THOMSON, *Vice-President.*

Attest: J. C. SIMS, *Secretary.*

And on the same day, to wit, on the 4th day of May, A. D. 1893, the answer of the N., C. & St. L. R'y Co., was filed in the
88 clerk's office of said court, which said answer is clothed in the words and figures following, to wit:

Answer of N., C. & St. L. R'y Co.

(Endorsed:) Filed 4th Day of May, 1893. Henry O. Ewing, Deputy Clerk.

The answer of the Nashville, Chattanooga & St. Louis railway to the bill of complaint filed in the circuit court of the United States for the eastern district of Tennessee, at Chattanooga, Tennessee, it being No. 384 on the equity docket in the case of The Interstate Commerce Commission *vs.* The East Tennessee, Virginia & Georgia Railway Company *et al.*, to which it is made a defendant.

I.

Respondent supposes it to be true that the East Tennessee, Virginia & Georgia Railway Company is a corporation created, chartered and existing under and by virtue of the laws of the State of Tennessee, and that it has its principal office at Knoxville in said State.

Respondent supposes it to be true that the Norfolk & Western Railroad Company is a corporation created, chartered and existing under and by virtue of the laws of the States of Virginia and West Virginia, and that it has its principal office at Roanoke, in the State of Virginia.

Respondent has no knowledge, information or belief, as to whether the Old Dominion Steamship Company is a corporation or not. Respondent's information is that the principal office of said company is at New York in the State of New York.

Respondent supposes it to be true that the Western & Atlantic Railroad Company was on April 9th, 1890, a corporation created, chartered and existing under and by virtue of the laws of the State of Georgia, and that it had its principal office at Atlanta in the State of Georgia.

Respondent supposes it to be true that the Central Railroad & Banking Company of Georgia is a corporation created, chartered and existing under and by virtue of the laws of the State of Georgia, and that it has its principal office at Savannah in said State.

Respondent is informed that there is no such corporation as the Georgia Railroad Company, but that the Louisville & Nashville Railroad Company and the Central Railroad & Banking Company of Georgia, as assignee of Wm. M. Wadley, lessee, operate a railroad from Atlanta to Augusta under the name of the Georgia Railroad Company, and the said assignees have at Augusta their principal office for the operation of the said railroad.

89 Respondent supposes it to be true that the Ocean Steamship Company of Savannah is a corporation created, chartered and existing under and by virtue of the laws of the State of Georgia, and that it has its principal office at Savannah in said State.

Respondent supposes it to be true that the South Carolina Railway Company is a corporation created, chartered and existing under and by virtue of the laws of the State of South Carolina, and that it has its principal office at Charleston in said State.

Respondent supposes it to be true that the Clyde Steamship Company is a corporation created, chartered and existing under and by virtue of the laws of the State of South Carolina, and that it has its principal office at Charleston in said State.

Respondent supposes it to be true that the Cincinnati, New Orleans & Texas Pacific Railway Company is a corporation created, chartered and existing under and by virtue of the laws of the State of Ohio, and that it has its principal office at Cincinnati in said State.

Respondent supposes it to be true that the Baltimore & Ohio Railroad Company is a corporation created, chartered and existing under and by virtue of the laws of the State of Maryland, and that it has its principal office at Baltimore in said State.

Respondent supposes it to be true that the Central Railroad Company of New Jersey, is a corporation created, chartered and existing under and by virtue of the laws of the State of New Jersey, and that it has its principal office at New York in the State of New York.

Respondent admits that it (respondent) is a co-poration created, chartered and existing under and by virtue of the laws of the State of Tennessee, and that it has its principal office at Nashville in the State of Tennessee. It has never been incorporated in Alabama, Georgia or Kentucky.

Respondent supposes it to be true that the Pennsylvania Railroad Company is a corporation created, chartered and existing under and by virtue of the laws of the State of Pennsylvania, and that it has its principal office at Philadelphia in said State.

Respondent supposes it to be true that the Pennsylvania Company is a corporation created, chartered and existing under and by virtue of the laws of the State of Pennsylvania, and that it has its principal office at Pittsburgh in said State.

Respondent supposes it to be true that the New York, Lake Erie & Western Railway Company is a corporation created, chartered and existing under and by virtue of the laws of the State of New York, and that it has its principal office at New York in said State.

90

Respondent supposes it to be true that the New York & New England Railroad Company is a corporation created, chartered and existing under and by virtue of the laws of the States of Massachusetts, Connecticut, Rhode Island and New York, and that it has its principal office at Boston in the State of Massachusetts.

Respondent supposes it to be true that the Delaware & Hudson Canal Company is a corporation created, chartered and existing under and by virtue of the laws of the State of New York, and that it has its principal office in New York in said State.

II.

Respondent admits that the defendants named in the petition filed in this case, were on the 9th of April, 1890, and still are common carriers, engaged in the transportation of persons and property; that some of them were and are so engaged wholly by railroad, and some of them wholly by water, and some of them partly by railroad and partly by water.

Respondent denies that there was on the 9th of April, 1890, or is now, any common control, management or arrangement between this respondent and any of its codefendants for the continuous carriage or shipment by its or their railroads or lines of steamers. As to whether any such common control, management or arrangement exists between any of the other defendants to the petition, respondent has no knowledge, information or belief.

Respondent admits that some of said defendants were and are engaged in the transportation of persons and property between seaboard points in the States of Massachusetts, New York, Pennsylvania and Maryland to points in the State of Tennessee.

III.

Respondent admits that on or about April 9th, 1890, an association styling itself the Board of Trade of Chattanooga, and claiming to be a mercantile society, duly incorporated under the laws of the State of Tennessee, and claiming to have its principal office at Chattanooga in said State, filed a petition before the Interstate Commerce Commission, for an alleged violation on the part of said defendant, of the provisions of the act to regulate commerce, and that Exhibit "A" to the petition filed in this case, is a true copy of said petition, and respondent admits that a true copy of said petition was forwarded to respondent; and respondent supposes it to be true that copies of said petition were forwarded to each of the other defendants named therein.

91

IV.

Respondent supposes it to be true that Exhibits B, C, D, E, F, G, H, I, K, L, O and P, to the petition filed in this case, are true copies

of the answers of the respective defendants as alleged in the petition filed in this case.

V.

Respondent admits that it appeared before the Interstate Commerce Commission at Chattanooga on the 12th day of November, 1890, and that some of its codefendents also appeared, but whether all of the defendants who are stated in the petition filed in this case as having appeared on that occasion did appear, respondent has no knowledge, information or belief, nor has it any knowledge or information as to whether said other defendants had any notice that there would be any hearing of the controversy at Chattanooga on that date.

VI.

Respondent denies that it was made to appear to the satisfaction of the said commission, at said alleged hearing, or at any other time, that this respondent had violated any of the provisions of the act to regulate commerce in any respect whatever, either as alleged in the original petition or otherwise.

Respondent denies that it has violated any of the provisions of said act as it will prove at the hearing of this case.

Respondent denies that said commission, duly, or legally, determined the matters or things that were in controversy, or at issue, between the said parties, on the contrary, respondent is advised, and so insists, that such determination of said matters and things as was made by said commission was illegal.

Respondent admits that said commission made a report in writing in respect to said matters and things, and that Exhibit "Q" to the petition filed in this case is a true copy of said report; which report included the finding of facts upon which the conclusion of said commission is based.

92 Respondent denies that said commission duly formulated any order or notice in relation to the matters or things stated or charged in said original petition.

Respondent denies that such order or notice as was made or issued by said commission with respect to said matters or things was in accordance with or agreeable to the requirements of the statute in such case made and provided.

Respondent denies that said order now remains in full force or effect, or that it was ever in force or effect.

Respondent supposes it to be true that said order has never been vacated, set aside, altered, modified or changed in any respect whatever, and it admits that Exhibit "R" to the petition filed in this case is a true copy of said order, but respondent is advised, and insists, that said order and said notice are illegal and not authorized by the act to regulate commerce.

Respondent admits that said commission caused a properly authenticated copy of its said report, together with said order and notice aforesaid, to be delivered to respondent.

VII.

Respondent denies that it has ever violated any of the provisions of the act to regulate commerce.

Respondent denies that it has at any time been unmindful of its duty or of any lawful decision or determination of said commission; or that it has ever disregarded or set at naught any lawful order or authority of said commission; or that it has ever wilfully or knowingly, or at all violated or disobeyed any lawful order of said commission.

VIII.

Respondent admits that prior to April 9th, 1890, and ever since that time it has participated in making, enforcing and receiving lower rates for the transportation of property from Boston in the State of Massachusetts, New York in the State of New York, Philadelphia in the State of Pennsylvania, Baltimore in the State of Maryland, and other eastern seaboard cities through Chattanooga to Nashville, than have been made and accepted by some of its co-defendants during the same time for the transportation of like property from Boston, New York, Philadelphia, Baltimore and other eastern seaboard cities to Chattanooga, Tennessee.

Respondent admits that such property has been transported by the same steamships and over the same railroads, in the same direction, and that the rates to Nashville from said eastern
93 seaboard cities have been less than the rates from said eastern seaboard cities to Chattanooga, and that the distance via said steamships and railroads is less to Chattanooga than to Nashville.

But, notwithstanding said facts are true, respondent denies that it has been guilty of any violation of the fourth section of the act to regulate commerce. Because, it says, that the transportation of such property from said eastern seaboard cities to Nashville, has not been and is not conducted under substantially similar circumstances and conditions as the transportation of like property from said eastern seaboard cities via said steamships and railroads to Chattanooga for the following reasons, viz:

1st. There are certain steamships and sailing vessels, which ply between said eastern seaboard cities and New Orleans, Louisiana, and certain steamboats and barges which ply from New Orleans to Paducah, Kentucky and beyond, and certain other steamboats which ply from Paducah to Nashville, Tennessee, thus forming lines of all-water transportation from said eastern seaboard cities to Nashville, and that rates of freight can be obtained by said lines of water transportation from said eastern seaboard cities to Nashville which prevent the all-rail rates from said eastern seaboard cities to Nashville being materially increased above what they are at present.

II.

Lines of steamships ply between said eastern seaboard cities and Newport News and Norfolk, Virginia; the Chesapeake & Ohio railroad extends from Newport News to Cincinnati, Ohio, and Louis-

ville, Kentucky, and the Norfolk & Western railroad extends from Norfolk to Norton, Kentucky, where it connects with the Louisville & Nashville railroad, which extends to Cincinnati and Louisville from Norton. That said last-mentioned steamships and railroads concede lower rates from said eastern seaboard cities to Cincinnati and Louisville respectively, than can be obtained by any all-rail lines, or any other known part rail and part water line. And they concede such rates to Cincinnati and Louisville from said eastern seaboard cities as added to prevailing rates from Cincinnati and Louisville to Nashville, renders it impossible to materially increase the all-rail rates from said eastern seaboard cities to Nashville above the present rates.

III.

94 The New York Central railroad, the Erie railroad, the Pennsylvania railroad and the Baltimore & Ohio railroad, which are known as the trunk lines and which extend from said eastern seaboard cities to Cincinnati and Louisville, concede such rates from said eastern seaboard cities to Cincinnati and Louisville, as added to prevailing rates from Cincinnati and Louisville to Nashville, renders it impossible to materially increase the all-rail rates from said eastern seaboard cities to Nashville above what they now are.

IV.

Certain steamboats ply between Cincinnati and Louisville on the one side and Evansville, Indiana, and Paducah, Kentucky, and points beyond on the other side, and certain lines of steamboats ply from Paducah, Kentucky, to Nashville, Tennessee. There is also a line of boats plying between Evansville and Nashville direct, and such rates can be obtained by said steamboat lines from Cincinnati and Louisville on the one side, to Nashville on the other side, as renders it impossible to increase the all-rail rate between Cincinnati and Louisville on the one side and Nashville on the other side, materially above what they are at present.

Respondent avers that there are no regular lines of water transportation from said eastern seaboard cities to Chattanooga, and no effective competition by water between said eastern seaboard cities and Chattanooga.

Respondent avers that there is no such all-water competition or all-rail competition, or part rail and part water competition between said eastern seaboard cities and Chattanooga, as prevails between said eastern seaboard cities and Cincinnati and Louisville and thence to Nashville.

Respondent avers that there is no such water competition between Cincinnati, Louisville, Evansville, Paducah and New Orleans, on the one side, and Chattanooga on the other, as there is between said cities and Nashville.

Respondent avers that the rates from said eastern seaboard cities to Chattanooga are just and reasonable in and of themselves.

Respondent avers that said rates are just and reasonable as com-

pared with the rates from said eastern seaboard cities to Atlanta and other cities located in the same section as Chattanooga. Chattanooga has the same rates from said eastern seaboard cities as Atlanta, though Atlanta is 138 miles nearer to the seacoast than Chattanooga.

Respondent avers that the rates from said eastern seaboard
95 cities to Chattanooga are the same as the rates from said eastern seaboard cities to Anniston, Alabama; Athens, Georgia; Atlanta, Georgia; Birmingham, Alabama; Cedartown, Georgia; Columbus, Georgia; Dalton, Georgia; Montgomery, Alabama; Eufaula, Alabama; Rome, Georgia; Selma, Alabama; Meridian, Mississippi; Opelika, Alabama, and Talladega, Alabama, and respondent insists that it would not be just and reasonable to reduce the rates from said eastern seaboard cities to Chattanooga, unless said rates were also reduced from said eastern seaboard cities to the above-mentioned cities, which have the same rates as Chattanooga, and none of said cities were represented before the Interstate Commerce Commission, nor are they before the court in this case.

Respondent avers that the rates charged from said eastern seaboard cities to Chattanooga and to Nashville respectively, do not constitute any unjust discrimination or undue preference in favor of Nashville as against Chattanooga. The rates from said eastern seaboard cities to Cincinnati, Louisville and Evansville, are lower than from said eastern seaboard cities to Nashville, and upon freight transported from said eastern seaboard cities through Chattanooga to Nashville, and thence to Cincinnati, Louisville and Evansville, the distance is less from said eastern seaboard cities via that route to Nashville than to Cincinnati, Louisville and Evansville.

The rates from said eastern seaboard cities to Cincinnati, Louisville and Evansville are made by the trunk-line roads above referred to, which do not transport through Chattanooga, and which therefore would not be subject to the operation of the fourth section of the act to regulate commerce, so far as traffic passing from said eastern seaboard cities through Chattanooga to Ohio River points is concerned. It would, therefore, be unjust and unreasonable to force defendants to raise the rates from said eastern seaboard cities to Nashville, via Chattanooga, and thus increase the disadvantage under which Nashville labors as compared with cities located upon the Ohio river, unless the rates from said eastern seaboard cities to said cities upon the Ohio river were also raised.

Whenever Nashville merchants attempt to sell goods north or west, or on the upper or lower Cumberland river, they meet active competition from the merchants of Cincinnati, Louisville, Evansville and other Ohio River cities including even St. Louis, Missouri.

Said trunk-line rates from said eastern seaboard cities to Cincinnati, Louisville and other Ohio River cities are made relative
96 to the rates which obtain between said eastern seaboard cities and Chicago, and the rates which obtain between said eastern seaboard cities and Chicago are controlled by the all-water

line via the lakes, canals and Hudson river, which extend from Chicago to New York. It is practically impossible to increase the rates between said eastern seaboard cities and Cincinnati, Louisville and other Ohio River cities, without increasing in the same proportion the rates from said eastern seaboard cities to Chicago, and said rates cannot be materially increased from said eastern seaboard cities to Chicago above the rates which obtain upon the water line aforesaid.

Respondent would be more than willing to increase the rates between said eastern seaboard cities and Nashville to those which now obtain between said eastern seaboard cities and Chattanooga, if it were possible to do so, but owing to the competitive circumstances and conditions above stated, it is utterly impossible to increase the rates from said eastern seaboard cities to Nashville materially above what they now are.

If therefore, the order made by the Interstate Commerce Commission in this case is to be enforced, the only result will be to prevent respondent and its connections working through Chattanooga, from participating in the traffic between said eastern seaboard cities to Nashville. It will injure respondent and said connections to the extent of many thousands of dollars every year, and yet it would be of no benefit whatever to Chattanooga or its merchants.

Having fully answered, respondent prays to be dismissed with reasonable costs.

NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY.

[SEAL.] By J. W. THOMAS, *President.*

ED. BAXTER,
EAST & FOGG,
J. D. DE BOW,
Att'ys for N., C. & St. L. R'y.

STATE OF TENNESSEE, }
Davidson County. }

Personally appeared before me, Sidney Goode, a notary public, duly appointed and qualified, in and for said county and State aforesaid, J. W. Thomas, president of the Nashville, Chattanooga & St. Louis Railway, the above-named respondent, and signed the foregoing and affixed the seal of said corporation thereto, as the answer of said corporation.

In testimony whereof, I have this day hereunto signed my
97 name and affixed my notarial seal at office at Nashville, Tennessee, this the 29th day of April, 1893.

SIDNEY GOODE,
[SEAL.] *Notary Public.*

And on the same day, to wit, the 4th day of May, A. D. 1893, there was filed in the clerk's office of said court the answer of the

W. & A. R. R. Co., which said answer is clothed in the words and figures following, to wit:

Answer of W. & A. R. R. Co.

(Endorsed:) Filed 4th Day of May, 1893. Henry O. Ewing, Deputy Clerk.

The answer of the Western & Atlantic Railroad Company to the bill of complaint filed in the circuit court of the United States for the eastern district of Tennessee, at Chattanooga, Tennessee, it being No. 384 on the equity docket in the case of The Interstate Commerce Commission *vs.* The East Tennessee, Virginia & Georgia Railway Company *et al.*, to which it is made a defendant.

I.

Respondent supposes it to be true that the East Tenn., Virginia & Georgia Railway Company is a corporation created, chartered and existing under and by virtue of the laws of the State of Tennessee, and that it has its principal office at Knoxville, in said State.

Respondent supposes it to be true that the Norfolk & Western Railroad Company is a corporation created, chartered and existing under and by virtue of the laws of the States of Virginia and West Virginia, and that it has its principal office at Roanoke in the State of Virginia.

Respondent has no knowledge, information or belief as to whether the Old Dominion Steamship Company is a corporation or not, respondent's information is that the principal office of said company is at New York in the State of New York.

Respondent admits that on April 9th, 1890, there was a corporation known as the Western & Atlantic Railroad Company, which was created, chartered and then existing under and by virtue of the laws of the State of Georgia, and that it had its principal office at Atlanta in said State. Respondent is a new and different corporation, though it has a similar name.

Respondent supposes it to be true that the Central Railroad & Banking Company of Georgia, is a corporation created, char-
98 tered and existing under and by virtue of the laws of the State of Georgia, and that it has its principal office at Savannah in said State.

Respondent is informed that there is no such corporation as the Georgia Railroad Company, but that the Louisville & Nashville Railroad Company, and the Central Railroad and Banking Company of Georgia, as assignees of Wm. M. Wadley, lessee, operate a railroad from Atlanta to Augusta under the name of the Georgia Railroad Company, and the said assignees have at Augusta their principal office for the operation of the said railroad.

Respondent supposes it to be true that the Ocean Steamship Company of Savannah is a corporation created, chartered and existing under and by virtue of the laws of the State of Georgia, and that it has its principal office at Savannah in said State.

Respondent supposes it to be true that the South Carolina Railway Company is a corporation created, chartered and existing under and by virtue of the laws of the State of South Carolina, and that it has its principal office at Charleston in said State.

Respondent supposes it to be true that the Clyde Steamship Company is a corporation created, chartered and existing under and by virtue of the laws of the State of South Carolina, and that it has its principal office at Charleston in said State.

Respondent supposes it to be true that the Cincinnati, New Orleans and Texas Pacific Railroad Company is a corporation created, chartered and existing under and by virtue of the laws of the State of Ohio, and that it has its principal office at Cincinnati in said State.

Respondent supposes it to be true that the Baltimore & Ohio Railroad Company is a corporation created, chartered and existing under and by virtue of the laws of the State of Maryland, and that it has its principal office at Baltimore in said State.

Respondent supposes it to be true that the Central Railroad Company of New Jersey is a corporation created, chartered and existing under and by virtue of the laws of the State of New Jersey, and that it has its principal office at New York in the State of New York.

Respondent supposes it to be true that the Nashville, Chattanooga & St. Louis railway was on April 9th, 1890, a corporation created, chartered and then existing under and by virtue of the laws of the State of Tennessee, and that it has its principal office at Nashville in said State. Respondent is informed that it has never been incorporated in Alabama, Georgia or Kentucky.

99 Respondent supposes it to be true that the Pennsylvania Railroad Company is a corporation created, chartered and existing under and by virtue of the laws of the State of Pennsylvania, and that it has its principal office at Philadelphia in said State.

Respondent supposes it to be true that the Pennsylvania Company is a corporation created, chartered and existing under and by virtue of the laws of the State of Pennsylvania, and that it has its principal office at Pittsburg in said State.

Respondent supposes it to be true that the New York, Lake Erie & Western Railway Company is a corporation created, chartered and existing under and by virtue of the laws of the State of New York, and that it has its principal office at New York in said State.

Respondent supposes it to be true that the New York and New England Railroad Company is a corporation created, chartered and existing under and by virtue of the laws of the State of Massachusetts, Connecticut, Rhode Island and New York, and that it has its principal office at Boston, in the State of Massachusetts.

Respondent supposes it to be true that the Delaware & Hudson Canal Company is a corporation created, chartered and existing under and by virtue of the laws of the State of New York, and that it has its principal office at New York in said State.

II.

Respondent admits that the defendants named in the petition filed in this case, were on the 9th of April, 1890, and still are common carriers, engaged in the transportation of persons and property; that some of them were and are so engaged wholly by railroad, and some of them wholly by water, and some of them partly by railroad and partly by water.

Respondent denies that there was on the 9th day of April, 1890, or is now, any common control, management or arrangement between this respondent and any of its codefendants for the continuous carriage or shipment by its or their railroads or lines of steamers.

As to whether any such common control, management or arrangement exists between any of the other defendants to the petition, respondent has no knowledge, information or belief.

Respondent admits that some of said defendants were and are engaged in the transportation of persons and property be-
100 tween seaboard points in the States of Massachusetts, New York, Pennsylvania and Maryland to points in the State of Tennessee.

III.

Respondent admits that on or about April 9th, 1890, an association styling itself the Board of Trade of Chattanooga and claiming to be a mercantile society, duly incorporated under the laws of the State of Tennessee, and claiming to have its principal office at Chattanooga in said State, filed a petition before the Interstate Commerce Commission, for an alleged violation on the part of said defendants, of the provisions of the act to regulate commerce, and that Exhibit "A" to the petition filed in this case, is a true copy of said petition; and respondent admits that a true copy of said petition was forwarded to respondent and respondent supposes it to be true, that copies of said petition were forwarded to each of the other defendants named therein.

IV.

Respondent supposes it to be true that Exhibits B, C, D, E, F, G, H, I, K, L, O, and P, to the petition filed in this case, are true copies of the answers of the respective defendants as alleged in the petition filed in this case.

V.

Respondent admits that it appeared before the Interstate Commerce Commission at Chattanooga on the 12th day of November, 1890, and that some of its codefendants also appeared, but whether all of the defendants who are stated in the petition filed in this case as having appeared on that occasion did appear, respondent has no knowledge, information or belief, nor has it any knowledge or information as to whether said other defendants had any notice that there would be any hearing of the controversy at Chattanooga on that date.

VI.

Respondent denies that it was made to appear to the satisfaction of said commission, at said alleged hearing, or at any other time, that this respondent had violated any of the provisions of the act to regulate commerce in any respect whatever, either as alleged in the original petition or otherwise.

Respondent further denies that it has violated any of the provisions of said act, as it will prove at the hearing of this case.

101 Respondent denies that said commission, duly or legally, determined the matters or things that were in controversy or at issue, between said parties, on the contrary, respondent is advised, and so insists, that such determination of said matters and things as was made by said commission was illegal.

Respondent admits that said commission made a report in writing in respect to said matters and things and that Exhibit "Q" to the petition filed in this case is a true copy of said report; which report included the finding of facts upon which the conclusion of said commission is based.

Respondent denies that said commission duly formulated any order or notice in relation to the matters or things stated or charged in said original petition.

Respondent denies that such order or notice as was made or issued by said commission with respect to said matters or things was in accordance with or agreeable to the requirements of the statute in such case made and provided.

Respondent denies that said order now remains in full force or effect, or that it was ever in force or effect.

Respondent supposes it to be true that said order has never been vacated, set aside, altered, modified or changed in any respect whatever, and it admits that Exhibit "R" to the petition filed in this case is a true copy of said order, but respondent is advised, and insists, that said order and said notice are illegal and not authorized by the act to regulate commerce.

Respondent admits that said commission caused a properly authenticated copy of its said report, together with said order and notice aforesaid, to be delivered to respondent.

VII.

Respondent denies that it has ever violated any of the provisions of the act to regulate commerce.

Respondent denies that it has at any time been unmindful of its duty, or of any lawful decision or determination of said commission; or that it has ever disregarded or set at naught any lawful order or authority of said commission; or that it has ever wilfully, or knowingly, or at all, violated or disobeyed any lawful order of said commission.

VIII.

Respondent admits that prior to April 9th, 1890, and ever since

that time, it has participated in making, enforcing and re-
102 ceiving lower rates for the transportation of property from Boston in the State of Massachusetts, New York in the State of New York, Philadelphia in the State of Pennsylvania, Baltimore in the State of Maryland, and other eastern seaboard cities through Chattanooga to Nashville, than have been made and accepted by it, and some of its codefendants, during the same time for the transportation of like property from Boston, New York, Philadelphia, Baltimore and other eastern seaboard cities to Chattanooga, Tennessee.

Respondent admits that such property has been transported by the same steamships and over the same railroads in the same direction, and that the rates to Nashville from said eastern seaboard cities have been less than the rates from said eastern seaboard cities to Chattanooga, and that the distance via said steamships and railroads is less to Chattanooga than to Nashville. But, notwithstanding said facts are true, respondent denies that it has been guilty of any violation of the fourth section of the act to regulate commerce. Because it says that the transportation of such property from said eastern seaboard cities to Nashville, has not been and is not conducted under substantially similar circumstances and conditions, as the transportation of like property from said eastern seaboard cities via said steamships and railroads to Chattanooga for the following reasons, viz:

I.

There are certain steamships and sailing vessels which ply between said eastern seaboard cities and New Orleans, Louisiana, and certain steamboats and barges which ply from New Orleans to Paducah, Kentucky, and beyond, and certain other steamboats which ply from Paducah, Kentucky, to Nashville, Tennessee, thus forming lines of all-water transportation from said eastern seaboard cities to Nashville, and that rates of freight can be obtained by said lines of water transportation from said eastern seaboard cities to Nashville, which prevent the all-rail rates from said eastern seaboard cities to Nashville being materially increased above what they are at present.

II.

Lines of steamships ply between said eastern seaboard cities and Newport News and Norfolk, Virginia; the Chesapeake & Ohio railroad extends from Newport News to Cincinnati, Ohio, and Louisville, Kentucky, and the Norfolk and Western railroad extends from Norfolk to Norton, Kentucky, where it connects with the
103 Louisville and Nashville railroad, which extends from Norton to Cincinnati and Louisville. That said last-mentioned steamships and railroads concede lower rates from said eastern seaboard cities to Cincinnati and Louisville, respectively, than can be obtained by any all-rail lines, or any other known part rail and part water line. And they concede such rates to Cincinnati and Louisville from said eastern seaboard cities, as added to prevailing rates from Cincinnati and Louisville to Nashville renders it impos-

sible to materially increase the all-rail rates from said eastern seaboard cities to Nashville above the present rates.

III.

The New York Central railroad, the Erie railroad, the Pennsylvania railroad, and the Baltimore & Ohio railroad, which are known as the trunk lines and which extend from said eastern seaboard cities to Cincinnati and Louisville, concede such rates from said eastern seaboard to Cincinnati and Louisville, as added to prevailing rates from Cincinnati and Louisville, renders it impossible to materially increase the all-rail rates from said eastern seaboard cities to Nashville above what they now are.

IV.

Certain steamboats ply between Cincinnati and Louisville on the one side and Evansville, Indiana, and Paducah, Kentucky, and points beyond, on the other side, and certain lines of steamboats ply from Paducah, Kentucky, to Nashville, Tennessee. There is also a line of boats plying between Evansville and Nashville direct, and such rates can be obtained by said steamboat lines from Cincinnati and Louisville on the one side, to Nashville on the other side, as renders it impossible to increase the all-rail rate between Cincinnati and Louisville on the one side, and Nashville on the other side, materially above what they are at present.

Respondent avers that there are no regular lines of water transportation from said eastern seaboard cities to Chattanooga, and no effective competition by water between said eastern seaboard cities and Chattanooga.

Respondent avers that there is no such all water competition or all-rail competition, or part rail and part water competition between said eastern seaboard cities and Chattanooga, as prevails between said eastern seaboard cities and Cincinnati and Louisville, and thence to Nashville.

104 Respondent avers that there is no such water competition between Cincinnati, Louisville, Evansville, Paducah and New Orleans on the one side, and Chattanooga on the other, as there is between said cities and Nashville.

Respondent avers that the rates from said eastern seaboard cities to Chattanooga are just and reasonable in and of themselves.

Respondent avers that said rates are just and reasonable as compared with the rates from said eastern seaboard cities to Atlanta and other cities located in the same section as Chattanooga.

Chattanooga has the same rates from said eastern seaboard cities as Atlanta, though Atlanta is 138 miles nearer to the seacoast than Chattanooga.

Respondent avers that the rates from said eastern seaboard cities to Chattanooga, are the same as the rates from said eastern seaboard cities to Anniston, Ala.; Athens, Ga.; Atlanta, Ga.; Birmingham, Alabama; Cedartown, Georgia; Columbus, Georgia; Dalton, Georgia; Montgomery, Alabama; Eufaula, Alabama; Rome, Georgia;

Selma, Alabama; Meridian, Mississippi; Opelika, Alabama, and Talladega, Alabama, and respondent insists that it would not be just and reasonable to reduce the rates from said eastern seaboard cities to Chattanooga, unless said rates were also reduced from said eastern seaboard cities to the other above-mentioned cities, which have the same rates as Chattanooga, and none of said cities were represented before the Interstate Commerce Commission, nor are they before the court in this case.

Respondent avers that the rates charged from said eastern seaboard cities to Chattanooga and to Nashville, respectively, do not constitute any unjust discrimination or undue preference in favor of Nashville as against Chattanooga. The rates from said eastern seaboard cities to Cincinnati, Louisville and Evansville are lower than from said eastern seaboard cities to Nashville, and upon freight transported from said eastern seaboard cities through Chattanooga to Nashville and thence to Cincinnati, Louisville and Evansville, the distance is less from said eastern seaboard cities via that route to Nashville than to Cincinnati, Louisville and Evansville.

The rates from said eastern seaboard cities to Cincinnati, Louisville and Evansville are made by the trunk-line roads above referred to, which do not transport through Chattanooga, and which therefore would not be subject to the operation of the fourth section of the act to regulate commerce so far as traffic passing from said eastern seaboard cities through Chattanooga to Ohio River points is concerned. It would, therefore, be unjust and unreasonable to force defendants to raise the rates from said eastern seaboard cities to Nashville via Chattanooga, and thus increase the disadvantage under which Nashville labors as compared with cities located upon the Ohio river, unless the rates from said eastern seaboard cities to said cities upon the Ohio river were also raised.

Whenever Nashville merchants attempt to sell goods North or West, or on the upper or lower Cumberland river, they meet active competition from the merchants of Cincinnati, Louisville, Evansville and other Ohio River cities, including even St. Louis, Missouri.

Said trunk-line rates from said eastern seaboard cities to Cincinnati, Louisville and other Ohio River cities are made relative to the rates which obtain between said eastern seaboard cities and Chicago, and the rates which obtain between said eastern seaboard cities and Chicago are controlled by the all-water line via the lakes, canals and the Hudson river, which extend from Chicago to New York. It is practically impossible to increase the rates between said eastern seaboard cities and Cincinnati, Louisville and other Ohio River cities, without increasing in the same proportion the rates from said eastern seaboard cities to Chicago, and said rates cannot be materially increased from said eastern seaboard cities to Chicago, above the rates which obtain upon the water line aforesaid.

Respondent would be more than willing to increase the rates between said eastern seaboard cities and Nashville to those which now obtain between said eastern seaboard cities and Chattanooga, if it were possible to do so, but owing to the competitive circum-

stances and conditions above stated, it is utterly impossible to increase the rates from said eastern seaboard cities to Nashville materially above what they now are.

If, therefore, the order made by the Interstate Commerce Commission, in this cause, is to be enforced, the only result will be to prevent respondent and its connections working through Chattanooga from participating in the traffic from said eastern seaboard cities to Nashville. It will injure respondent and said connections to the extent of many thousands of dollars every year, and yet it would be of no benefit whatever to Chattanooga or its merchants.

Having fully answered, respondent prays to be dismissed with reasonable costs.

106 WESTERN & ATLANTIC RAILROAD COMPANY,
By J. W. THOMAS, *General Manager.*

ED. BAXTER,
EAST & FOGG,
J. D. DE BOW, *Att'ys.*

STATE OF TENNESSEE, }
Davidson County. }

Personally appeared before me, Sidney Goode, a notary public, duly appointed and qualified in and for said county and State aforesaid, J. W. Thomas, general manager of The Western & Atlantic Railroad Company, the above-named respondent, and signed the foregoing as the answer of said railroad. Said corporation has no seal.

In testimony whereof, I have this day hereunto signed my name and affixed my notarial seal at office at Nashville, Tennessee, this the 29 day of Apr., 1893.

SIDNEY GOODE,
[SEAL.] *Notary Public.*

And afterwards, to wit, on the 6th day of May, A. D. 1893, the answer of the Louisville & Nashville Railroad Company and the Central Railroad & Banking Company of Georgia was filed in the clerk's office of said court; which said answer is clothed in the words and figures following, to wit:

Answer of the Louisville & Nashville Railroad Company and the Central Railroad and Banking Company of Georgia.

(Endorsed:) Filed 6 Day of May, 1893. Henry O. Ewing, Deputy Clerk.

The joint and several answer of the Louisville & Nashville Railroad Company and the Central Railroad and Banking Company of Georgia (sued by the name of the "Georgia Railroad Company") to the bill filed in equity in the circuit court of the United States for the eastern district of Tennessee by the Interstate Commerce Commission against the East Tennessee, Virginia and Georgia Railway Company and others, No. 384 on the rule docket of said court.

107 I.

Respondents aver that there is no such corporation as the "Georgia Railroad Company."

The Georgia Railroad & Banking Company is a corporation created, chartered and existing under and by virtue of the laws of the State of Georgia, and has its principal office at Augusta in said State.

Said company owns a main line of railroad extending from Augusta to Atlanta and certain branch railroads, all of which are in the State of Georgia.

On May 7th, 1881, said company leased its main line and branch railroads, together with certain other property, rights, privileges and franchises, to Wm. M. Wadley, and his assigns, for a term of 99 years from Ap'l 1st, 1881.

Afterwards and in the year 1881, the said Wadley transferred and assigned to respondents the joint control and management of the said Georgia railroad and its dependencies, together with the advantages, and profits resulting from the same during the full term of said lease. And ever since said transfer or assignment, respondents have been jointly operating said railroads.

For convenience, said joint operation is conducted under the name of the "Georgia railroad," but as before stated there is no such corporation as the "Georgia Railroad Company."

II.

Respondents suppose it to be true that the companies named as defendants in this case are (with the exception of the Georgia Railroad Company) corporations; that they were respectively created, and chartered, and are now existing under and by virtue of the laws of the several States averred in the petition; and that they respectively have their principal office at the places averred in said petition.

III.

Respondents admit that the companies named as defendants in the petition filed in this case, were, on Ap'l 9th, 1890, and still are,

common carriers engaged in the transportation of persons and property over their respective railroads, or in their respective steamships. Some of said defendants are so engaged in transportation wholly by water; some of them are so engaged wholly by railroad; and some of them are so engaged partly by water and partly by railroad.

108 Respondent, The L. & N. R. R. Co., owns a majority of the capital stock of its codefendant, The Nashville, Chattanooga & St. Louis Railway.

Said Nashville, Chattanooga & St. Louis railway has leased the Western & Atlantic railroad for a term of 29 years from Dec. 27th, 1890.

Respondent, The Central Railroad and Banking Company of Georgia, owns the capital stock of its codefendant, the Ocean Steamship Co.

But with the exceptions just mentioned (if they can be regarded as exceptions), the defendants in this case are not under any common management or control, so far as respondents are informed, or believe. Respondents have no information or belief that there is any arrangement between said defendants for continuous carriage or shipment, by their respective railroads or lines of steamships, except that certain of said defendants have agreed to establish certain through routes with certain through rates, for the transportation of persons and property between certain points.

Some of said defendants have agreed upon such through routes with through rates, for the transportation of persons and property between seaboard points in the States of New York, Pennsylvania and Maryland respectively, to points in the State of Tennessee.

IV.

Respondents admit that on or about Ap'l 9th, 1890, an association, styling itself the Board of Trade of Chattanooga, and claiming to be a mercantile society duly incorporated under the laws of the State of Tennessee, and claiming to have its principal office at Chattanooga, in said State, filed a petition before the Interstate Commerce Commission for an alleged violation by said defendants of the provisions of the act to regulate commerce; and that Exhibit "A" to the petition filed in this case, is a true copy of said original petition. Respondents admit that a true copy of said petition was forwarded to them; and they suppose it to be that copies of said original petition were forwarded to each of the other defendants named therein.

V.

Respondents suppose it to be true that Exhibits B, C, D, E, F, G, H, I, K, L, M, N, O and P, to the petition filed in this case are as alleged in said petition, true copies of the answers which were filed respectively by the defendants to said original petition.

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VI.

Respondent, The Central Railroad and Banking Company of Georgia, and certain others of the defendants to said original petition, appeared before the Interstate Commerce Commission, at Chattanooga, on the 12th day of November, 1890; but respondent, The L. & N. R. R. Co., did not appear. Whether all of the other defendants which are mentioned in the petition, filed in the case, as having appeared on that occasion, did in fact appear, respondents have no information or belief; nor have respondents any information or belief as to whether any of said other defendants had notice that there would be a hearing of the controversy at that time or place.

VII.

Respondents deny that it was made to appear to the satisfaction of said commission, at said alleged hearing, or at any other time that respondents had in any respect violated any of the provisions of the act to regulate commerce; and respondents deny that they had in any respect violated any of the provisions of said act. Respondents deny that said commission duly or legally determined the matters or things in controversy, or at issue, between said parties. On the contrary, respondents are advised, and insist, that such determination as was made by said commission, of said matters and things was not in accord with said act, and was therefore illegal.

Respondents admit that said commission made a report in writing in respect to said matters and things, which report included the findings of fact upon which the conclusions of said commission were based; and respondents admit that Exhibit "Q" to the petition filed in this case, is a true copy of said report.

Respondents deny that said commission duly formulated an order or notice, in relation to the matters or things stated or charged in said original petition. On the contrary respondents are advised and insist that such order as was made by said commission, was not made agreeably to the requirements of the statute in such case made and provided, and was therefore illegal and void.

Respondents admit that said order has never been vacated, set aside, altered, modified or changed in any respect; but they deny that it remains in full force or effect. On the contrary they are advised and insist that it was, and is illegal, and therefore has never been in force or effect. Respondents admit that Exhibit "R" to the petition filed in this case, is a true copy of said alleged
110 order. Respondents admit that they received a duly authenticated copy of said report, order and notice.

VIII.

Respondents deny that they have been unmindful of their duty, or of any lawful decision or determination of said commission. Respondents deny that they have wholly, or at all, disregarded or set at naught, any lawful authority, or order of said commission, in regard to any matter whatever.

Respondents deny that they have knowingly or wilfully, or at all, violated or disobeyed any lawful order of said commission.

Respondents deny that they have wholly or at all, neglected or refused, or that they now neglect or refuse, to comply with any lawful order or requirement of said commission.

IX.

Respondents admit that, without having made application to said commission for relief from the fourth section of the act to regulate commerce, they have, since Feb. 1st, 1893, in connection with certain of their codefendants, made, enforced and received, higher rates for the transportation of property from Boston, in the State of Massachusetts; New York, in the State of New York; Philadelphia, in the State of Pennsylvania; Baltimore, in the State of Maryland, and other eastern seaboard points, to Chattanooga, Tenn., than have been made and accepted by them during the same time, for transportation to Nashville, Tenn. Respondents aver that transportation from Boston, New York, Philadelphia, Baltimore and other eastern seaboard points to Chattanooga, is not conducted under substantially similar circumstances and conditions, with transportation from said eastern cities to Nashville; and that the dissimilarity between such circumstances and conditions is such that respondents and their connections may lawfully charge and receive lower rates to Nashville than to Chattanooga, from said eastern seaboard cities, without violating the fourth section, or any of the other provisions of the act to regulate commerce.

Said lower rates to Nashville are forced upon respondents and their connections by certain competitive circumstances and conditions which exist at Nashville, but do not exist at Chattanooga.

111 X.

The rates from New York and other eastern seaboard cities to Nashville are controlled by the following competitive circumstances and conditions.

First. The rail rates from New York to Chicago are inflexibly controlled by the direct competition of water carriers on the lakes, and the St. Lawrence river, and the Erie canal, and the Hudson river.

Second. The rail rates from New York to Chicago having been thus fixed with reference to direct water competition as aforesaid, rail rates from Boston, Philadelphia, Baltimore and other eastern seaboard cities respectively, to Chicago, are made to bear a certain fixed relation to the rates which obtain from New York to Chicago.

Third. The rail rates from New York, Boston, Philadelphia, Baltimore and other seaboard cities respectively, to Chicago, having been thus fixed, the rates from said eastern cities to Cincinnati, Louisville, Evansville and St. Louis respectively, are made to bear certain fixed relations to the rates which obtain from said eastern seaboard cities, respectively, to Chicago.

Fourth. The relations which exist between the rates from Boston, Philadelphia, Baltimore and other eastern seaboard cities, respectively, as compared with the rates from New York, and the relations which exist between the rates to Cincinnati, Louisville, Evansville and St. Louis, respectively, as compared with the rates to Chicago have been fixed for many years. They were fixed by competition fierce and protracted; and it would be impossible now to disturb the adjustment, without throwing the entire commerce of the country into confusion.

Fifth. Steamships and sailing vessels ply between New York, Boston, Philadelphia, Baltimore and other eastern seaboard cities on the one side and New Orleans on the other. Steamboats and barge lines ply between New Orleans, on the one side, and Memphis, Paducah, Evansville, Louisville and Cincinnati, on the other. There is, therefore, an open, all-water route from all of said eastern seaboard cities, to Louisville and Cincinnati, and the all-rail rates from said eastern seaboard cities, to Cincinnati and Louisville, respectively, cannot greatly exceed the rates which can be obtained by said all-water route.

Steamboat lines ply between Paducah and Evansville on the Ohio river, and Nashville on the Cumberland river. Said boats connect with boats which ply upon the Ohio and Mississippi rivers,
112 and the result is that Nashville also has an open, all-water route from said eastern seaboard cities. The rail rates from said cities cannot therefore, greatly exceed the rates which can be obtained by said all-water route.

Sixth. The all-rail rates from said eastern seaboard cities to Cincinnati and Louisville respectively, are also materially affected by the fact that steamship lines ply between said eastern seaboard cities on the one side, and Newport News and Norfolk, Virginia, on the other. The Chesapeake & Ohio railroad extends from Newport News to Cincinnati and Louisville; and the Norfolk and Western railroad extends from Norfolk to Cincinnati and Louisville, and the rates which can be obtained by those two part water and part rail routes cannot be greatly exceeded by the all-rail routes.

Seventh. The rates from said eastern seaboard cities to Cincinnati and Louisville, respectively, having been fixed by the competitive circumstances and conditions above referred to, the rail rates from said eastern seaboard cities to Nashville cannot greatly exceed the rates to Cincinnati or Louisville, added to the rates which can be obtained by steamboats from Cincinnati or Louisville to Nashville.

It will be seen therefore that the rates from said eastern seaboard cities to Nashville are practically controlled by water competition.

XI.

There is no effective open-water route from said eastern seaboard cities to Chattanooga, nor from Cincinnati or Louisville to Chattanooga. The water competition which forces down the through rail rates from Cincinnati and Louisville, respectively, to Nashville does not extend to Chattanooga.

XII.

Respondents aver that the rates charged from said eastern seaboard cities, respectively, to Chattanooga, are just and reasonable, in and of themselves, considering the circumstances and conditions under which the transportation is conducted. They are the result of actual competition between various all-rail lines, and various part rail and part water lines of transportation. Chattanooga has the full benefit of all the competition which exists there; but it so happens that there is no such water competition at that place as there is between Cincinnati, Louisville and Nashville.

113 XIII.

The rates to Chattanooga from said eastern seaboard cities are the same as from said cities to Atlanta, Georgia, which is 138 miles nearer the seacoast than Chattanooga.

XIV.

The rates from Chattanooga to said eastern seaboard cities are the same as from said cities to Athens, Atlanta, Cedartown, Columbus, Rome and Dalton, Georgia; Anniston, Birmingham, Montgomery, Eufaula, Opelika, Talladega and Selma, Alabama; and Meridian, Mississippi. It would be an unjust discrimination against said cities in favor of Chattanooga, to reduce the rates to Chattanooga without reducing them at the same time to all of those cities which have the same rates as Chattanooga.

XV.

The rates from said eastern seaboard cities are less to Cincinnati, Louisville and Evansville, than to Nashville.

In all the territory north, east and west of Nashville, the Nashville merchants are forced to compete with the merchants of Cincinnati, Louisville and Evansville; and if the rates from said eastern seaboard cities to Nashville shall be increased, the Nashville merchants will be placed at a still greater disadvantage in their competition with Cincinnati, Louisville, and Evansville; unless the rates to those cities shall also be increased correspondingly.

XVI.

The rates from said eastern seaboard cities to Nashville are made by transportation lines which do not work through Chattanooga, and it would be unjust to force the Georgia railroad, and the other lines which work through Chattanooga, to increase the rates to Nashville, unless the lines which do not work through Chattanooga, are forced to correspondingly increase their rates to Nashville, at the same time.

XVII.

Certain relations have for many years existed between the rates from said eastern seaboard cities to Memphis, and the rates from said eastern seaboard cities to Nashville; and it would be an unjust

discrimination in favor of Memphis against Nashville to increase the rates to Nashville, without correspondingly increasing the rates to Memphis at the same time.

114 The commission decided in this case, in effect, that owing to water competition, it is practically impossible to increase the rates to Memphis; and it will be found that it is equally impossible to increase them to Nashville.

And having fully answered, respondents pray to be dismissed with their reasonable costs.

ED. BAXTER,
JOS. B. CUMMINS,
Solicitors for Respondents, Louisville & Nashville Railroad Company.

[L. & N. SEAL.] By —— ——, *President.*

Attest: —— ——, *Secretary.*

STATE OF KENTUCKY, }
County of Jefferson. }

Personally appeared before me, —— ——, a notary public, duly appointed, commissioned and qualified, in and for the State and county aforesaid, M. H. Smith and —— Ellis, who are respectively president and secretary of The Louisville and Nashville Railroad Company, the above-named respondent, and signed the foregoing answer and affixed thereto the seal of said company, as the answer of said company.

Witness my hand and notarial seal of office at Louisville, Kentucky, this — day of May, 1893.

——,
Notary Public.

And afterwards, to wit, on the 15th day of May, A. D. 1893, the answer of the Ocean Steamship Company of Savannah was filed in the clerk's office of said court, which said answer is clothed in the words and figures following, to wit:

Answer of Ocean Steamship Company of Savannah.

(Endorsed:) Filed May 15, 1893. Henry O. Ewing, Deputy Clerk.

115 In the Circuit Court of the U. S., Southern Division, Eastern District of Tennessee.

INTERSTATE COMMERCE COMMISSION *vs.* EAST TENN., VA. & GA. RAILWAY CO. and THE Ocean Steamship Co. of Savannah *et al.*	In Equity. No. 384.

The Answer of the Ocean Steamship Co. of Savannah to the Petition Filed in the Above Case.

This defendant appearing to the said petition under and pursuant to the order of your honorable court made on the 24th day of March,

1893, served upon H. M. Comer, as its president, in the city of Savannah, State of Ga., most respectfully protesting, states that its principal office as fixed by its charter is at Savannah, Ga., and that it is a corporation duly organized and existing under the laws of the State of Georgia, and engaged exclusively in ocean traffic, plying from the city of Savannah, in State of Georgia, to New York, in the State of New York, and other points, and that its principal office is not situated within the eastern district of Tennessee, nor were any of the alleged violations or disobedience by it of the order of the Interstate Commerce Commission, referred to in said petition, committed or happen within the judicial district of the circuit court of the U. S. for the eastern district of Tenn., and therefore petitioner was not authorized under the act to regulate commerce as amended to file its petition as against this defendant in this court.

Wherefore this defendant prays that the said petition shall be as to it dismissed.

Second. This defendant likewise protesting against the said petition, excepts thereto because the charge or charges made against said defendants or against this defendant are not set out with sufficient certainty, nor does it show in what manner or how this defendant has in any way violated said interstate-commerce act or the order of the Interstate Commerce Commission, nor does said petition in other respects disclose with reasonable certainty what said defendants or this defendant were or was required to do and observe thereunder.

Wherefore this defendant prays that the said petition shall as to to it be dismissed.

Third. This defendant, without conceding the jurisdiction
116 of your honorable court or waiving the foregoing plea, the protests, exceptions and prayers for dismissal of this petition, as to this defendant, but expressly reserving to itself all rights, benefits and advantages therefrom as fully as if it had rested solely thereon, for answer to said petition, saith :

I.

That the proportion of the through rate received by it for carriage over its line of the traffic which is the subject-matter of complainant, is just and reasonable and as it is fixed is not in violation of the act to regulate commerce.

II.

This defendant avers that the conclusions of the said plaintiff commission were not justified by the law or the facts, because *inter alia* of the character of the service and facts and circumstances which are in larger parts set out and disclosed in the answers to the original complaint, attached as exhibits to the petition filed in this cause, and particularly exhibits marked C, D, E, F, I, K and M, and reference is hereby made to said exhibits with like force and effect as if the contents of said exhibits were in form or in substance herein fully set out and recited.

III.

This defendant further avers that its proportions of the rates received for such traffic were and are as little as it can afford to do same for.

IV.

This defendant is advised and therefore avers that the act entitled "An act to regulate commerce" does not authorize the commission, under such circumstances as were presented to it by the complainant in answers filed and by the evidence taken thereunder, to determine and find that rates such as were received by this defendant under the circumstances, were in violation of said act, and this defendant denies that the said board of trade was and is entitled to any relief as against it, but avers that the rates then and now maintained by this defendant were and are reasonable and just, proper and lawful.

Wherefore, this defendant prays that the petition in this cause may be dismissed as to it, not only for want of jurisdiction
117 and because of defective petition as hereinbefore set out and prayed for, but also for lack of just foundation for relief in fact and in law.

Witness the corporate seal of said Central Railroad & Banking Company of Georgia, hereto attached, duly attested this — day of May, 1893.

THE OCEAN STEAMSHIP COMPANY,
By H. M. COMER, *President.*

Attest: T. M. CUNNINGHAM, *Cashier.*
[SEAL.]

BARR & McADOO,
Solicitors for Defendant.

And on the same day, to wit, the 15th day of May, 1893, there was filed in the clerk's office of said court the answer of the Central Railroad & Banking Company of Georgia, which said answer is clothed in the words and figures following, to wit:

Answer of Central Railroad & Banking Company of Georgia.

(Endorsed:) Filed May 15, 1893. Henry O. Ewing, Deputy Clerk.

In the U. S. Circuit Court of the United States, Southern Division of the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION *vs.* EAST TENN., VA. & GA. RAILWAY CO., THE CENTRAL R. R. & BANKING CO OF GA., *et al.*	In Equity. No. 384.

The answer of the Central Railroad & Banking Company of Ga. to the petition filed in the above-stated cause.

This defendant appearing to said petition under and pursuant to an order of your honorable court made on 24th day of March, 1893,

most respectfully protesting and reserving to itself all matters of exceptions to said bill, shows:

First. That said order, subpœna and bill have not been properly served upon the defendant, The Central R. R. & Banking Co. of Ga., as the principal office of said defendant is and always has been
118 and is fixed by its charter at Savannah, in the State of Georgia, and not in Atlanta, in said State.

Second. This defendant shows that its principal office is not situate in the judicial district of the circuit court of the U. S. for the eastern district of Tennessee, nor were any of the alleged violations or disobedience by it to the order of the Interstate Commerce Commission, referred to in said petition, and which were considered in the matter of the Board of Trade of Chattanooga against your said defendant and others, and referred to in said petition, committed within said eastern district of Tenn., and for these reasons petitioner in this cause was not authorized under the act to regulate commerce as amended to file its petition as against this defendant in this court.

Wherefore this defendant prays that the said petition shall as to it be dismissed.

Third. This defendant shows that at the time *of* said proceedings on the part of the Board of Trade of Chattanooga against defendant was had, it did not operate any line of railroad within the State of Tenn., or the eastern district thereof, further than delivering within the State of Ga. to connecting lines, freight, merchandise and persons transported over its lines, which at that time did not extend beyond the limits of the State of Ga., within the State of Tennessee.

Fourth. This defendant, likewise protesting against said petition, excepts thereto because it says that said petition does not set out with sufficient certainty the charge or charges made against said defendant, nor the fact or facts relied on and on which the same are founded, now does it show in what particular or how this defendant has been guilty of any violations of said order of the Interstate Commerce Commission; and further in that the proceedings had and taken by and before the Interstate Commerce Commission — not well and sufficiently pleaded nor pleaded according to their legal effect so as to disclose with reasonable certainty what the said defendants or this defendant were or was required to do and observe thereunder.

Wherefore this defendant prays that said petition shall as to it be dismissed.

Fifth. This defendant, without conceding the jurisdiction of your honorable court or waiving the foregoing plea, the protests, exceptions and prayers for dismissal of this petition, as to this defendant, but expressly reserving to itself all rights, benefits and advantages therefrom as full- as if it had rested solely thereon, for answer to said petition, saith:

119 I.

That the proportion of the through rate received by it for carriage over its line of the traffic which is the subject-matter of complainant, is just and reasonable, and as it is fixed is not in violation of the act to regulate commerce.

II.

This defendant avers that the conclusions of the said plaintiff commission were not justified by the law or the facts, because, *inter alia* of the character of the service and facts and circumstances which are in larger parts set out and disclosed in the answers to the original complaint, attached as exhibits to the petition filed in this cause, and particularly exhibits marked C, D, E, F, I, K, and M, and reference is hereby made to said exhibits with like force and effect as if the contents of said exhibits were in form or in substance herein fully set out and recited.

III.

This defendant further avers that its proportions of the rates received for such traffic were and are as little as it can afford to do same for.

IV.

This defendant is advised and therefore avers that the act entitled an act to regulate commerce, does not authorize the commission under such circumstances as were presented to it by the complainant in answers filed and by the evidence taken thereunder to determine and find that rates such as were received by this defendant under the circumstances, were in violation of said act, and this defendant denies that the said board of trade was and is entitled to any re ief as against it, but avers that the rates then and now maintained by this defendant were and are reasonable and just, proper and lawful.

Wherefore, this defendaut prays that the petition in this cause may be dismissed as to it, not only for want of jurisdiction and because of defective petition, as hereinbefore set out and prayed for, but also for lack of just foundation for relief in fact and in law.

Witness the corporate seal of said Central Railroad & Banking Company of Georgia, hereto attached and duly attested this
120 — day of May, 1893.

THE CENTRAL RAILROAD AND BANKING COMPANY,
By H. M. COMER, *President.*

Attest: T. M. CUNNINGHAM, *Cash.*

BARR & McADOO,
Solicitors for Defendant.

And on the same day, to wit, the 15th day of May, 1893. replication of complainant to the answer of the Pennsylvania Railroad

Company was filed in the clerk's office of said court, which said replication is clothed in the words and figures following, to wit:

Replication to the Answer of the Pennsylvania Railroad Company.

(Endorsed:) Filed May 15, 1893. Henry O. Ewing, Deputy Clerk.

In the United States Circuit Court for the Southern Division of the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY *et al.*

Replication of complainant to the answer of the Pennsylvania Railroad Company in said cause.

This repliant, saving and reserving all advantage of exception to the said answer, because of the manifold insufficiencies thereof, for replication thereto says, that it will aver and prove its said bill to be true and sufficient, and that said answer is untrue and insufficient, wherefore it prays relief as in said bill set out, etc.

H. M. WILTSE,
Solicitor for Complainant.

And on the same day, to wit, the 15th day of May, A. D. 1893, the replication of the complainant, to the answer of the Central Railroad and Banking Company of Georgia, was filed in the
121 clerk's office of said court, which said replication is clothed in the words and figures following, to wit:

Replication to the Answer of the Central Railroad and Banking Company of Georgia.

(Endorsed:) Filed May 15, 1893. Henry O. Ewing, Deputy Clerk.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY *et al.*

Replication of complainant in the above-styled cause to the answer of the Central Railroad and Banking Company of Georgia.

This repliant, saving and reserving all benefit and advantage of exception to the manifold insufficiencies of the said answer, for replication thereto says that it will aver and prove its said bill to be true and sufficient and that the said answer is untrue and insufficient.

It therefore prays relief as in the said bill set forth and prayed.

H. M. WILTSE,
Solicitor for Complainant.

And on the same day, to wit, the 15th day of May, A. D. 1893, there was filed in the clerk's office of said court the replication of the complainant to the answer of the Louisville and Nashville Railroad Company and the Central Railroad and Banking Company of Georgia, which said replication is clothed in the words and figures following, to wit:

Replication to the Answer of the Louisville and Nashville Railroad Company and the Central Railroad and Banking Company of Georgia.

(Endorsed:) Filed May 15, 1893. Henry O. Ewing, Deputy Clerk.

122 In the United States Circuit Court for the Southern Division of the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILway Company *et al.* } Equity.

Replication of complainant to the answer in the above-styled cause of the Louisville and Nashville Railroad Company and the Central Railroad and Banking Company of Georgia.

This repliant, saving and reserving all benefit and right and advantage of exception to the said answer because of the manifold insufficiencies thereof, for replication thereto says that it will aver and prove its said bill to be true and sufficient, and that the said answer is untrue and insufficient; wherefore it prays relief as in the said bill set forth and prayed.

H. M. WILTSE,
Solicitor for Complainant.

And on the same day, to wit, the 15th day of May, A. D. 1893, there was filed in the clerk's office of said court the replication of the complainant to the answer of the East Tennessee, Virginia and Georgia Railway Company, which said replication is clothed in the words and figures following, to wit:

Replication to the Answer of the East Tennessee, Virginia and Georgia Railway Company.

(Endorsed:) Filed May 15, 1893. Henry O. Ewing, Deputy Clerk.

In the United States Circuit Court in and for the Southern Division of the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILway Company *et al.* } Equity.

Replication of complainant in the above cause to the answer of the East Tennessee, Virginia and Georgia Railway Company.

123 This repliant, saving and reserving all advantage of exception to the manifold insufficiencies of said answer for

replication thereto says, that it will aver and prove its said bill to be true and sufficient, and that said answer is untrue and insufficient, wherefore it prays relief as in said bill set forth and prayed.

H. M. WILTSE,
Solicitor for Complainant.

And on the same day, to wit, the 15th day of May, 1893, the replication of the complainant to the answer of the Western and Atlantic Railroad Company was filed in the clerk's office of said court, which said replication is clothed in the words and figures following, to wit:

Replication of Complainant to the Answer of the Western and Atlantic Railroad Company.

(Endorsed:) Filed May 15, 1893. Henry O. Ewing, Deputy Clerk.

In the United States Circuit Court for the Southern Division of the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY ET AL.

Replication of complainant in the above-styled cause to the answer of the Western and Atlantic Railroad Company.

This repliant, saving and reserving all advantage of exception to the said answer, because of the manifold insufficiencies thereof, for replication thereto says, that it will aver and prove its bill to be true and sufficient and says that the said answer is untrue and insufficient; wherefore it prays relief as in said bill set forth and prayed.

H. M. WILTSE,
Solicitor for Complainant.

And on the same day, to wit, the 15th day of May, 1893,
124 there was filed in the clerk's office of said court the replication of complainant to the answer of the Nashville, Chattanooga and St. Louis railway, which said replication is clothed in the words and figures following, to wit:

Replication to the Answer of the Nashville, Chattanooga and St. Louis Railway.

(Endorsed:) Filed May 15, 1893. Henry O. Ewing, Deputy Clerk.

In the United States Circuit Court for the Southern Division of the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY Company *et al.* } Equity.

Replication of complainant to the answer of the Nashville, Chattanooga and St. Louis railway.

This repliant, reserving the right and benefit and advantage of all proper exceptions to the said answer because of the manifold insufficiencies thereof, by way of replication thereto, says that it will aver and prove its said bill to be true and sufficient, and that said answer is untrue and insufficient; wherefore it prays relief as in said bill set forth, etc.

H. M. WILTSE,
Solicitor for Complainant.

And on the same day, to wit, the 15th day of May, A. D. 1893, there was filed in the clerk's office of said court the replication of complainant to the answer of the Cincinnati, New Orleans & Texas Pacific Railway Company, which said replication is clothed in the words and figures following, to wit:

Replication to the Answer of the Cincinnati, New Orleans and Texas Pacific Railway Company.

(Endorsed:) Filed May 15, 1893. Henry O. Ewing, Deputy Clerk.

125 In the United States Circuit Court for the Southern Division of the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY Company *et al.*

Replication of complainant in the above-styled cause to the answer of The Cincinnati, New Orleans and Texas Pacific Railway Company, defendant.

This repliant, saving and reserving all advantage of exception to the manifold insufficiencies of said answer, thereunto saith that it will aver and prove its said bill to be true and sufficient, and that

the said answer is untrue and insufficient; wherefore it prays relief as in the bill set forth and prayed, etc.

H. M. WILTSE,
Solicitor for Complainant.

And on the same day, to wit: the 15th day of May, A. D. 1893, there was filed in the clerk's office of said court the replication of complainant to the plea of the Delaware and Hudson Canal Company, which said replication is clothed in the words and figures following, to wit:

Replication to Plea of Delaware & Hudson Canal Co.

(Endorsed:) Filed 1893, May 15. Henry O. Ewing, Deputy Clerk.

In the United States Circuit Court for the Southern Division of the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY *et al.*

Replication of complainant in the above-stated cause to the plea of the Delaware and Hudson Canal Company.

126 This complainant by way of replication to said plea, says that it is not well pleaded as matter of law and is not true as matter of fact. It says that under the law this honorable court has jurisdiction both of the person of the said defendant and the subject-matter of its said petition as the same relates to the said defendant, and that the said defendant has been guilty of violations and disobedience of complainant's orders and requirements as alleged in the petition within the eastern district of Tennessee and at divers other places under such circumstances as give to complainant the legal right to bring this suit against the said defendant and prosecute the same in this court.

Complainant avers and will prove that its said bill is true and sufficient, and that said plea is untrue and insufficient, wherefore it prays for relief as prayed and set forth in its said bill, etc.

H. M. WILTSE,
Solicitor for Complainant.

And on the same day, to wit, the 15th day of May, A. D. 1893, an entry was made upon the journal of said court, which said entry is clothed in the words and figures following, to wit:

Journal "C," page 440, May 15th, 1893.

THE INTERSTATE COMMERCE COMMISSION }
vs. }
E. T., V. & GA. R'Y CO. ET AL. }

In this cause it is ordered by the court that def'ts be allowed 90 days from this time in which to take proof in chief and petitioners are allowed 30 days thereafter in which to take proof in rebuttal, and by consent it is ordered that each and every of the def'ts who have not answered be allowed to rely upon the answers already filed on behalf of their codef'ts, and the replications filed to these answers shall be treated as replications as to any def'ts so relying on such answers. The application for a preliminary injunction is disallowed. It is also ordered that in taking proof, notice to H. M. Wiltse shall be sufficient.

127 And afterwards, to wit: on the 19th day of May, A. D. 1893, a certain demurrer to replication was filed in the clerk's office of said court; which said demurrer is clothed in the words and figures following, to wit:

Demurrer to Replication.

(Endorsed:) Filed 1893, May 19th. Henry O. Ewing, Deputy Clerk.

THE INTERSTATE COMMERCE COMMISSION }
vs. }
THE E. T., V. & GA. R'Y CO. ET AL. }

The defendant "The President, Managers and Company of the Delaware and Hudson Canal Company" demurrer to the replication filed by plaintiff to its plea in abatement heretofore filed in this cause, because said replication is double, as it seeks to raise an issue of law on the sufficiency of said plea and also an issue of fact as to the truth thereof.

Defendant prays judgment that said replication be stricken out.

LEWIS SHEPHERD, *Solicitor.*

And afterwards, to wit: on the 26th day of July, A. D. 1893, an entry was made upon the journal of said court; which said entry is clothed in the words and figures following, to wit:

Journal "C," page 513, July 26, 1893.

THE INTERSTATE COMMERCE COMMISSION }
vs. } No. 384.
E. TENN., VA. & GA. R'Y CO. ET AL. }

In this cause the former order as to taking proof is so far modified as to allow defendants until Sept. 15, 1893, in which to take proof.

And on the same day, to wit: the 26th day of July, A. D. 1893, a petition was filed in the clerk's office of said court, making
128 The Louisville & Nashville Railroad Company a party defendant, and order thereon; which said petition and order are clothed in the words and figures following, to wit:

Petition Making Louisville & Nashville Railroad Company a Party Defendant and Order Thereon.

(Endorsed:) Filed July 26, 1893. Henry O. Ewing, Deputy Clerk.

The United States Circuit Court for the Southern Division of the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA Railway Company *et al.* } In Equity. No. 384.

And now comes the petitioner in the above-entitled cause and asks leave to amend the original complaint therein by striking out in the 22d, 23d and 24th lines of the 2d page thereof the following words, namely: "The Georgia Railroad Company is a corporation created, chartered and existing under and by virtue of the laws of the State of Georgia and having its principal office at Augusta in said State," and inserting in lieu thereof the following, namely: "The Georgia railroad is an association consisting of the Louisville and Nashville Railroad Company, a corporation created, chartered and existing under and by virtue of the laws of the State of Kentucky, and having its principal office at Louisville in that State, and the Central Railroad and Banking Company of Georgia, a corporation created, chartered and existing under and by virtue of the laws of the State of Georgia, and having its principal office at Savannah, in said State, and said association being known and doing business jointly under the name and style of Georgia railroad;" and that an order may be entered making the Louisville and Nashville Railroad Company a party defendant to this cause.

THE INTERSTATE COMMERCE COMMISSION,
By A. G. SAFFORD, *Solicitor.*

It is hereby agreed on the part of the Louisville and Nashville Railroad Company and the Central Railroad and Banking Company of Georgia, that the foregoing amendment may be
129 allowed, and service of notice of said original petition is hereby accepted and further service of said petition and of the order which may be entered in this proceeding is waived.

It is agreed by complainant that the answer heretofore filed in this cause by the Louisville and Nashville R. R. Co., and the Cen-

tral R. R. and Banking Co: may be accepted as their answer without being filed.

ED. BAXTER,
Sol'r for L. & N. R. R.
A. G. SAFFORD,
Solicitor for Compl't.

Order on Above Petition.

And now on the filing of the foregoing petition and stipulation it is ordered that the prayer of the petitioner be granted, and that the amendment stated in said petition be incorporated into the original complaint, and that the Louisville & Nashville Railroad Company be, and is hereby, made a party defendant in this cause without further service or notice, and that the answer heretofore filed in this cause by the Louisville & Nashville Railroad Company and the Central Railroad & Banking Company of Georgia shall be accepted as their answer to the original complaint, the same as if said answer was filed subsequent to the granting of this order.

Done in court this 26 day of July, 1893.

D. M. KEY, *Judge.*

And on the same day, to wit, the 26th day of July, A. D. 1893, there was filed in the clerk's office of said court a certain petition making Henry Fink, C. M. McGhee and Samuel Spencer, receivers, and D. H. Chamberlain, receiver, and S. M. Felton, receiver, parties, and the order thereon, which said petition and order are clothed in the words and figures following, to wit:

Petition and Order Making Henry Fink, C. M. McGhee, S. Spencer, Receivers; D. H. Chamberlain, Receiver, and S. M. Felton, Receiver, Parties.

(Endorsed:) Filed July 26, 1893. Henry O. Ewing, Deputy Clerk.

130 In the United States Circuit Court for the Southern Division of the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA AND Georgia Railway Company *et al.*
In Equity. No. 384.

And now comes the complainant in the above-entitled cause and shows to the court here that Samuel Felton and Charles M. McGhee and S. Spencer, of New York, in the State of New York, and Henry Fink, of Knoxville, in the State of Tennessee, are the receivers and managers of the East Tennessee, Virginia & Georgia railway, and that D. H. Chamberlain, of Charleston, in the State of South Carolina, is the receiver and manager of the South Carolina railway, and that S. M. Felton, of Cincinnati, in the State of Ohio, is the receiver and manager of the Cincinnati, New Orleans & Texas Pacific

railway; and inasmuch as the said receivers of the said several railways may have an interest in any order, direction or decree which the court may make in this cause, the complainant respectfully prays that an order may be entered by this honorable court making the said persons parties defendant in this proceeding and directing method of service, and requiring the said additional parties to make answer to the matters and things set forth in the said complaint by a day certain, the same as if they had been made parties to the original complaint.

THE INTERSTATE COMMERCE COMMISSION,
By A. G. SAFFORD, *Solicitor.*

Order.

Upon the filing of the foregoing petition it is ordered that the prayer of the petition be granted and that Henry Fink, of Knoxville, in the State of Tennessee, and Samuel Felton and Charles M. McGhee and S. S. Spencer, of New York, in the State of New York, receivers and managers of the East Tennessee, Virginia & Georgia railway; D. H. Chamberlain, of Charleston, in the State of South Carolina, receiver and manager of the South Carolina railway, and
S. M. Felton, of Cincinnati, in the State of Ohio, receiver
131 and manager of the Cincinnati, New Orleans and Texas Pacific railway, are hereby made parties defendant in the above-entitled cause. Service of the pendency of said cause and this order shall be made upon said persons by delivering to each a true and attested copy of the original petition on or before the fifth day of August, 1893, and said persons are hereby required to make answer to said petition the same as if they were original parties to the same, on or before the 20th day of Augnst, 1893.

Done in court this 26th day of July, 1893.

D. M. KEY, *Judge.*

And afterwards, to wit, on the 28th day of July, 1893, there was filed in the office of the clerk of said court certain interrogatories to be propounded to Sol. Haas, J. M. Culp and others, which said interrogatories are clothed in the words and figures following, to wit:

Interrogatories to be Propounded to Sol. Haas, J. M. Culp, and Others.

(Endorsed:) Filed 28 Day of July, 1893. Henry O. Ewing, Deputy Clerk.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE E. T., V. & G. R'Y Co. and Others. } In Equity. No. —.

Now pending on the equity side of the circuit court of the United States for the southern division of the eastern district of Tennessee, at Chattanooga.

Interrogatories filed by respondents upon which to take the evidence of the following witnesses to be read on the trial of the above-named cause on behalf of said respondents, viz: Sol. Haas, Washington, D. C.; J. M. Culp, Washington, D. C.; Thos. Pinckney, 217 Broadway, N. Y.; W. L. Guillaudeau, pier 26, North river, N. Y.; W. C. Bullitt, Roanoke, Va.; T. S. Davant, Roanoke, Va.; Edwin Fitzgerald, Knoxville, Tenn.

Int. 1.

Please state your name, residence and occupation.

Int. 2.

State for what length of time you have followed such occupation.

132 Int. 3.

State about what proportion of the freights, which pass over your road destined for Nashville, Tenn., are routed via Chattanooga.

Int. 4.

Explain by what other routes such freight is routed.

Int. 5.

State the charges on such Nashville freights, via Chattanooga, and via other routes.

Int. 6.

Explain the advantages to shippers by the route via Chattanooga over the other routes, if any.

Int. 7.

What are the reasons why the charges via the Chattanooga route cannot be increased, if such be the fact?

Int. 8.

What effect has water navigation on the various routes other than via Chattanooga on the price and amount of freights, by the latter routes?

Int. 9.

What are the present charges on the various classes of freights to Chattanooga?

Int. 10.

Are such charges reasonable, and if so, upon what bases and reasons?

Int. 11.

Could such rates be lowered to Chattanooga so as to leave a reasonable profit to the common carriers, and if not, why?

Int. 12.

Are the rates of freight to Nashville via Chattanooga, as at present charged, reasonable, and if so, for what reasons?

Int. 13.

State any other fact within your knowledge, material to the issues in this case.

W. A. HENDERSON,
Sol'r for Respondents.

133 And afterwards, to wit, on the 14th day of August, 1893, there were filed in the clerk's office of said court certain cross-interrogatories to be propounded to Sol. Haas, J. M. Culp and others, which said cross-interrogatories are clothed in the words and figures following, to wit:

Cross-interrogatories to be Propounded to Sol. Haas, J. M. Culp, and Others.

(Endorsed:) Filed 14 Day of Aug., 1893. Henry O. Ewing, Deputy Clerk.

INTERSTATE COMMERCE COMMISSION
vs.
EAST TENNESSEE, VIRGINIA AND GEORGIA Railroad Company *et al.* } In Equity. No. —.

Now pending on the equity side of the circuit court of the United States for the southern division of the eastern district of Tennessee at Chattanooga.

Cross-interrogatories filed by petitioner to interrogatories filed by respondents, upon which to take the evidence of the following witnesses to be read on the trial of the above-named cause, namely: Sol. Haas, Washington, D. C.; J. M. Culp, Washington, D. C.; Thomas Pinkney, 217 Broadway, New York; W. L. Guillaudeau, pier 26, North river, New York; W. C. Bullitt, Roanoke, Va.; T. S. Davant, Roanoke, Va., and Edwin Fitzgerald, Knoxville, Tenn.

Cross-interrogatory No. 1. Is the railroad or steamship line with which you are connected a defendant in this case?

Cross-interrogatory No. 2. State the carriers and route or routes

by which traffic over your road or line reaches Chattanooga and Nashville from eastern cities, if any such traffic is consigned over your road or line; and state the distance over each of said routes.

Cross-interrogatory No. 3. State in tons the amount of freight carried over your road or line during the year ending June 30, 1892, which was destined to Chattanooga from eastern cities; what was the amount in tons of such freight destined to Nashville; and also give such tonnage to Chattanooga and Nashville for the year ending June 30, 1893. If necessary to compile these statements in order to answer this cross-interrogatory let your answer be so framed as to make such statements to be furnished within a reasonable time, a part thereof.

134 Cross-interrogatory No. 4. State approximately how in amount the tonnage which passes over your road or line as shipments from eastern cities to Chattanooga compares with the tonnage of such shipments passing over your road to Nashville.

Cross-interrogatory No. 5. How are the through rates in which your road or line participates as part of through routes from New York to Chattanooga and Nashville divided between the carriers. State the division or proportion received by each carrier in each route, and if the division is on a mileage basis state the number of miles allowed each carrier.

Cross-interrogatory No. 6. What are the rates per ton per mile on first-class traffic by each of these routes from New York to Chattanooga and Nashville, respectively.

Cross-interrogatory No. 7. Does your road or line engage at through rates in the carriage of property from any eastern city through Chattanooga or Nashville or both to points beyond Nashville, for instance, Kansas City, St. Louis, Cairo, Hickman, Memphis, Topeka, Leavenworth, Galveston and Fort Worth and, if so, at what rates on first-class traffic and at what rate per ton per mile and describe the routes.

Cross-interrogatory No. 8. Do not the all-rail routes via short lines from eastern cities through Cincinnati to Nashville actually control rates to the latter point via Chattanooga to the exclusion of any other method of routing.

Cross-interrogatory No. 9. If the routes which reach Nashville via Chattanooga should retire from taking Nashville traffic, in your opinion would freights destined for Nashville from eastern cities go to that point by water or by rail?

Cross-interrogatory No. 10. Do you of your own knowledge know of any through shipments of important amounts of traffic being shipped from eastern cities to Nashville by rail lines to Cincinnati, there transferred to boat for Paducah and there again transferred to boat for Nashville. If so when and under what conditions were such shipments made and to what classes did such traffic belong?

Cross-interrogatory No. 11. Does each road, line or route which reaches Chattanooga, Nashville and other important points in the South make rates to those points independently; if not, state explicitly how they are made.

Cross-interrogatory No. 12. Name the carriers, if any,
135 which do not participate in the carriage of traffic to Chattanooga from eastern cities that have a voice and vote in the making of rates to that point from eastern cities; and also name such carriers who so act with respect to Nashville rates.

Cross-interrogatory No. 13. Consult the rate sheets showing freight charges from eastern cities to points on the routes to Chattanooga and Nashville of which your road or line is a part and state what points, if any, which are situate on these routes a less distance from said eastern cities than Nashville or Chattanooga are charged higher rates than those in effect to Nashville or Chattanooga, or both, as the case may be.

Cross-interrogatory No. 14. Consult the rate sheets which apply to Nashville through Cincinnati, and state what points nearer Cincinnati than Nashville, if any, are charged higher rates from eastern cities than those in effect from said cities to Nashville. Make the same statement with reference to points between Chattanooga and Cincinnati.

Cross-interrogatory No. 15. What are the distances by short lines from Cincinnati to Nashville and Chattanooga respectively?

Cross-interrogatory No. 16. Taking the routes through Cincinnati to Nashville and Chattanooga in your opinion is the difference in rates from eastern cities to Nashville and Chattanooga (which difference is 23 cents on first-class articles) warranted by the difference in distance?

Cross-interrogatory No. 17. Can you say positively that the reduction of the rates from eastern cities to Chattanooga would result in substantial loss of revenue to carriers to that point?

Cross-interrogatory No. 18. Might not such reduction to Chattanooga result in such increase of business to the carriers as would nearly, if not fully, make up for the reduction?

Cross-interrogatory No. 19. In making rates to important points in the South like Atlanta, Chattanooga, Nashville, etc., you regard them as competitive points, do you not?

Cross-interrogatory No. 20. Please explain what proportion of the freights you have referred to in answer to direct interrogatory number three come from Boston, New York, Baltimore, Philadelphia, or other eastern seaboard cities.

Cross-interrogatory No. 21. Please state the charges upon each of the classes of freight, first, second, third, fourth, fifth and sixth, to
136 Nashville via Chattanooga by the line which your road or the corporation you represent is a part, and also the charges upon the same classes of freight, by the said line to Chattanooga.

Cross-interrogatory No. 22. Please state the distance from each of the cities above named, Boston, New York, Baltimore and Philadelphia, by your line to Chattanooga, and the distance from each of the said cities, by said line to Nashville.

Cross-interrogatory No. 23. Please state the distance from each of the said cities to Nashville by way of Cincinnati and the Ohio and Cumberland rivers to Nashville.

Cross-interrogatory No. 24. If you have stated that the charges to Nashville upon freight over your line could not be increased, state and explain fully why they could not be, and state also whether in your opinion the charges to Chattanooga might be decreased. If you say they could not explain fully why they could not.

Cross-interrogatory No. 25. If you state that water transportation has any effect upon rates to Nashville from any of the eastern seaboard cities state fully by what route freight can be shipped to Nashville and give water transportation any control over or influence upon rates that would not in like manner enter into and affect rates to Chattanooga. If you say that freight can be shipped to Nashville by any such route or routes state whether it actually is shipped by such route or routes in such quantities or amounts as to render the competition of such routes of any controlling force or influence.

Cross-interrogatory No. 26. What time is consumed in delivery of freight from Boston in Nashville by the route of which your line is part, via Chattanooga?

What time is required for delivery of freight from New York in Nashville by same route?

What time is consumed in delivery of freight from Philadelphia in Nashville by same route?

Cross-interrogatory No. 27. What time would be required for the delivery of freight from each of the above-named cities respectively by way of Cincinnati and the Ohio and Cumberland rivers, in Nashville?

Cross-interrogatory No. 28. If you cannot answer the two interrogatories, numbers 26 and 27, as to time precisely and definitely, do the best you can by giving the approximate time required for delivery in each case suggested.

Cross-interrogatory No. 29. What effect, if any, would the difference in time which you have described have upon the efficiency of the respective routes for freight carriage and profit earnings?

137 Cross-interrogatory No. 30. What advance upon the present rates to Nashville by your route—via Chattanooga—would probably result in a change by Nashville merchants to the use of the Cincinnati and Ohio and Cumberland Rivers route for general shipping despite the discrepancy in mileage and the increased time consumed in the shipment of freights by the latter route?

Cross-interrogatory No. 31. Are not the rates to Nashville an equal prorate of the regular rates of the trunk lines to Cincinnati and Louisville, extended over the Louisville and Nashville railway to Nashville?

Cross-interrogatory No. 32. Are not the rates to Chattanooga a large advance upon the trunk-line rates to Cincinnati and Louisville with the excess charges extended over the East Tennessee, Virginia and Georgia railway and the Cincinnati Southern railway to Chattanooga?

Cross-interrogatory No. 33. If you say in answer to direct interrogatory No. 10 that the charges upon the various classes of freight to Chattanooga are reasonable, state whether or not the rates to Nashville pay the carriers or not. If you say that the rates to

Nashville impose a loss upon the carriers, state what per cent. of loss they suffer by reason of them.

Cross-interrogatory No. 34. What do you mean by the term "a reasonable profit to the common carrier," as used in answer to direct interrogatory No. 11? What do you consider a reasonable profit to the common carrier, and how do you arrive at the result of profit or loss to the carrier as you have used the term in your said answer?

H. M. WILTSE,
Solicitor for Complainant.

And afterwards, to wit, on the 14th day of August, A. D. 1893, the answer of S. M. Felton, receiver, was filed in the clerk's office of said court, which said answer is clothed in the words and figures following, to wit:

Answer of S. M. Felton, Receiver.

(Endorsed:) Filed 14th Day of Aug., 1893. Henry O. Ewing, Deputy Clerk.

138 The United States Circuit Court for the Southern Division of the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA & GEORGIA Railway Company *et al.* } In Equity. No. 384.

Answer of S. M. Felton, rec'v'r Cincinnati, New Orleans & Texas Pacific R'y Co.

S. M. Felton, receiver of the Cincinnati, New Orleans & Texas Pacific Railway Company, by way of answer, says that on the 18th of March, A. D. 1893, he was duly appointed and qualified as receiver of said railway company by the circuit court of the United States for the southern district of Ohio; that he is now engaged in the operation of the line of railway of said company as such receiver under orders of said court, and further answering, he says that he adopts as his answer the allegations of the answer of the Cincinnati, New Orleans & Texas Pacific Railway Company filed herein.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC R'Y CO.
S. M. FELTON, *Receiver.*

STATE OF NEW YORK, }
City and County of New York. }

S. M. Felton, being first duly sworn, makes oath and says that the allegations of the foregoing answer are true as he verily believes.

Sworn to before me and subscribed in my presence this 7th day of August, A. D. 1893.

[SEAL.]

S. F. SULLIVAN,
Notary Public, Kings County.

Certificate filed in New York county.

And afterwards, to wit, on the 17th day of August, A. D. 1893, an entry was made upon the journal of said court, which said entry is clothed in the words and figures following, to wit:

139 Journal "C," page 521, August 17, 1893.

INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY *et al.*

In this cause, an order having been previously made making Charles M. McGhee, Samuel Spencer and Henry Fink, receivers, parties, and service having been duly made upon the said Charles M. McGhee and Samuel Spencer, but not upon Henry Fink, it is agreed by the undersigned solicitors as follows:

The appearance of the said Henry Fink is hereby entered generally, by his solicitor.

The answer filed by and for the East Tennessee, Virginia and Georgia Railway Company shall stand for and be treated as the answers of the said Charles M. McGhee, Samuel Spencer and Henry Fink, receivers, and the replication thereto shall be treated as the replication of complainant to each of said answers, and the cause shall proceed as to each and all of said receivers as if they had been originally made parties.

And afterwards, to wit, on the 24th day of August, A. D. 1893, a certain agreement of counsel was filed in the clerk's office of said court, which said agreement is clothed in the words and figures following, to wit:

Agreement of Counsel.

(Endorsed:) Filed Aug. 24, 1893. Henry O. Ewing, Deputy Clerk.

In the United States Circuit Court for the Southern Division of the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY *et al.*

In this case it is agreed that the evidence to be hereafter
140 taken at the option of the parties, may be taken either under the rules and regulations applicable to the State practice or to those applicable to the Federal court practice.

August 14th, 1893.

H. M. WILTSE.
W. A. HENDERSON.

And afterwards, to wit, on the 2nd day of April, A. D. 1894, an entry was made upon the journal of said court, which said entry is clothed in the words and figures following, to wit:

Journal "D," page 196, April 2, 1894.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY *et al.*

By consent of parties this cause is continued until the next term of the court.

And afterwards, to wit, on the 14th day of Nov., 1896, the joint and several answer of the Norfolk and Western R'y Co., and the Ocean Steamship Co. was filed in the clerk's office of said court, which said answer is clothed in the words and figures following, to wit:

Joint and Several Answer of the Norfolk & Western R'y Co. and the Ocean Steamship Co.

(Endorsed:) Filed Nov. 14, 1896. Henry O. Ewing, Clerk.

The joint and several answer of the Norfolk & Western Railway Company and the Old Dominion Steamship Company to the petition filed by the Interstate Commerce Commission against the East Tennessee, Virginia and Georgia Railway Company and others, in the circuit court of the United States, sitting in equity, within and for the eastern district of Tennessee.

I.

Respondents suppose it to be true that the East Tennessee,
141 Virginia and Georgia Railway Company was a corporation created, chartered and existing under and by virtue of the laws of the State of Tennessee, and that it had its principal office at Knoxville, in said State.

Respondents admit that the Norfolk & Western Railroad Company was a corporation, created, chartered and existing under and by virtue of the laws of the States of Virginia and West Virginia, and that it had its principal office at Roanoke, in the State of Virginia.

But respondents aver that under certain foreclosure proceedings on February 6th, 1895, F. J. Kimball and Henry Fink were appointed receivers of said Norfolk & Western Railroad Company in the States of Virginia, West Virginia, North Carolina and Maryland; and on February 7th, 1895, said Fink was appointed receiver of said road in Ohio.

Said Norfolk & Western railroad, with the exception of the Winston-Salem division from Roanoke, Virginia, to Winston-Salem, North Carolina, and that part of the Scioto Valley division extending from Coal Grove, Ohio, to Columbus, Ohio, was sold under said foreclosure proceedings on September 15th and 16th, 1896, and has been acquired by the Norfolk and Western Railway Company, a

corporation duly created, chartered and existing under and by virtue of the law of the State of Virginia, and said Norfolk & Western Railway Company, at midnight of September 30th, 1896, assumed the operation of the railroads and property so sold and has operated them ever since.

Respondents admit that respondent, The Old Dominion Steamship Company, is a corporation created, chartered and existing under and by virtue of the laws of the State of Delaware, and that it has its principal office at New York in the State of New York.

Respondents suppose it to be true that the other corporations named on pages 2 and 3 of the printed petition filed in this case were, at the time said petition was filed, corporations respectively created, chartered and existing under and by virtue of the laws of the several States, as therein set forth; and that they had their respective principal offices at the cities and in the States as therein set forth.

II.

Respondents admit that the defendants named in the petition filed in this case were, at the time of the committing of the so-called grievances specially mentioned in said petition, common carriers engaged in the transportation of persons and property over the lines owned by them respectively; some of said defendants were
142 and are so engaged wholly by railroad; some of them were and are so engaged wholly by water, and some of them were and are so engaged partly by water and partly by railroad.

Respondents deny that said defendants were or are under any common control or management. Respondents deny that there was or is any arrangement between respondents, or either of them, and any of their codefendants for the continuous carriage or shipment of persons or property, unless the issuance of through bills of lading or the making of joint through tariffs constitute such an arrangement.

Respondents admit that they were and are, in connection with certain of their codefendants, engaged in the transportation of persons and property between seaboard points in the States of Massachusetts, New York, Pennsylvania and Maryland on the one side, and certain points in the State of Tennessee on the other side.

III.

Respondents admit that on or about the 9th day of April, 1890, the Board of Trade of Chattanooga, claiming to be a mercantile society duly incorporated under the laws of the State of Tennessee, and having its principal office at Chattanooga in said State, filed a petition before the Interstate Commerce Commission for the alleged violation on the part of the defendants named in said petition of certain provisions of the act to regulate commerce; and that Exhibit A to the petition filed in this court is a correct copy of said petition filed before said commission.

Respondents admit that a copy of said petition, filed before said

commission, duly attested by the secretary of said commission under the seal of said commission, was duly forwarded by said commission to the Norfolk & Western Railroad Company and to respondent, The Old Dominion Steamship Company, as required by the 13th section of said act; and respondents suppose it to be true, that a similar copy was also forwarded to each of the other defendants named in said petition filed before said commission.

IV.

Respondents suppose it to be true that Exhibits B, C, D, E, F, G, H, I, K, L, M, N, O and P to the petition filed in this court are correct copies of the answers filed by the defendants therein named to the petition filed before said commission, and that said answers were filed on or about the dates mentioned in the petition filed in this court.

143 V.

Respondents admit that said matter came on for investigation and hearing before said commission on the 12th day of November, 1890; that said commission was duly and legally assembled for that purpose at Chattanooga, Tennessee; that said Chattanooga Board of Trade, said Norfolk & Western Railroad Company, and respondent, The Old Dominion Steamship Company, appeared at said hearing; and respondents suppose it to be true that some of their codefendants also appeared at said hearing, but as to which of them so appeared or had notice of said hearing respondents do not know nor do they have any information or belief.

VI.

Respondents deny that it was made to appear to the satisfaction of said commission at said hearing or at any other time, that either of these respondents or the said Norfolk & Western Railroad Company had violated any of the provisions of the act to regulate commerce, either as alleged in said petition filed before said commission, or otherwise.

Respondents deny that either of them has violated any of the provisions of said act.

Respondent, The Norfolk & Western Railway Company, is advised and insists that it is not responsible for violations of said act that may have been committed by the Norfolk & Western Railroad Company or by said receivers of the Norfolk & Western Railroad Company, if any violations were committed by them, or either of them, which, however, respondent, The Norfolk & Western Railway Company, denies upon information and belief.

Respondents deny that said commission, duly or legally, determined the matters or things that were in controversy or at issue between said parties; on the contrary, respondents are advised and so insist, that such determination of said matters and things as was made by said commission was and is illegal and void.

Respondents admit that said commission made a report in writing

in respect of said matters and things, and that Exhibit Q to the petition filed in this court in this case is a correct copy of said report.

Respondents admit that said report included certain so-called findings of fact upon which certain so-called conclusions of law were attempted to be based.

Respondents deny that said commission duly formulated
144 any order or notice in relation to the matters and things stated or charged in said petition filed before said commission.

Respondents deny that said order or notice as formulated by said commission was formulated in accordance with, or agreeably to, the requirements of the statute in such case made and provided.

Respondents deny that said order now remains in full force or effect, because they insist that it was and is illegal and void.

Respondents admit that said order has never been vacated, set aside, altered, modified, or changed in any respect whatever; and they admit that Exhibit "A" to the petition filed in this court in this case is a correct copy of said order; but respondents insist, as above stated, that said order is illegal and void.

Respondents admit that on or about January 13th, 1893, said commission caused a properly authenticated copy of its said report, and of said order and notice to be delivered to the Norfolk & Western Railroad Company, and to respondent, The Old Dominion Steamship Company; and respondents suppose it to be true that similar copies of said report, order, and notice were delivered to the other defendants in the petition filed before said commission.

VII.

Respondents deny that either of them has, at any time, been unmindful of its duty, or of any lawful decision or determination of said commission, or that it has ever disregarded or set at naught any lawful order or authority of said commission, or that it has ever willfully or knowingly or at all violated or disobeyed any lawful order of said commission.

VIII.

Respondents admit that prior to April 9th, 1890, and since that time said Norfolk & Western Railroad Company, and said receivers of said Norfolk & Western Railroad Company, and these respondents have participated in making, enforcing, and receiving higher rates for the transportation of freight from Boston, in the State of Massachusetts; New York, in the State of New York; Philadelphia, in the State of Pennsylvania; Baltimore, in the State of Maryland, and other eastern seaboard points to Chattanooga aforesaid than have been made and accepted by them at the same time for like transportation to Nashville, in the State of Tennessee.

145 Respondents admit that such freight has been transported by the same steamships and over the same railroads in the same direction; that the rates to Nashville from said eastern sea-

board cities and eastern seaboard points have been less than the rates from the same eastern seaboard cities and points to Chattanooga; that the distance via said steamships and railroads is less to Chattanooga than to Nashville; and that the shorter distance is included within the longer distance. But, notwithstanding said facts are true, respondents deny that either of them has been guilty of any violation of the 4th section of the act to regulate commerce; because it says, that the transportation of such freight from said eastern seaboard cities and points to Nashville, has not been and is not conducted under substantially similar circumstances and conditions as the transportation of like freight from said eastern seaboard cities and points via said steamships and railroads to Chattanooga; and for the following reasons, viz:

There are certain steamships and sailing vessels which ply between said eastern seaboard cities and points on the one side, and New Orleans, Louisiana, on the other side; certain steamboats and barges ply from New Orleans to Paducah, Kentucky, and beyond; and certain other steamboats ply from Paducah to Nashville, Tennessee, thus forming lines of all-water transportation from said eastern seaboard cities and points to Nashville. Such rates of freight can be obtained by said lines of water transportation from said eastern seaboard cities and points to Nashville as prevent the all-rail rates from said eastern seaboard cities and points to Nashville being materially increased above what they are at present. No such water competition exists at Chattanooga.

IX.

Lines of steamships ply between said eastern seaboard cities and Newport News, Virginia; and the Chesapeake & Ohio railroad extends from Newport News to Cincinnati, Ohio, and Louisville, Kentucky. Said steamships and railroad accept lower rates from said eastern seaboard cities to Cincinnati and Louisville, respectively, than can be obtained by any all-rail line; and they accept such rates to Cincinnati and Louisville, respectively, from said eastern seaboard cities as, added to prevailing rates from Cincinnati and Louisville, respectively, to Nashville, render it impossible to materially increase the all-rail rates from said eastern seaboard cities to Nashville above the present rates.

146 X.

The New York Central railroad, the Erie railroad, the Pennsylvania railroad and the Baltimore & Ohio railroad, which are known as the trunk lines, and which extend from said eastern seaboard cities to Cincinnati and Louisville, respectively, accept such rates from said eastern seaboard cities to Cincinnati and Louisville, respectively, as added to the prevailing rates from Cincinnati and Louisville, respectively, to Nashville, render it impossible to materially increase the all-rail rates from said eastern seaboard cities, via Chattanooga to Nashville, above the present rates.

XI.

Steamboats ply between Cincinnati and Louisville on the one side, and Evansville, Indiana; Paducah, Kentucky, and points beyond on the other side; and steamboats also ply between Paducah, Kentucky, and Nashville, Tennessee. There is also a line of boats plying between Evansville and Nashville, Tennessee, direct; and such rates can be obtained by said steamboats from Cincinnati and Louisville, respectively, to Nashville, as render it impossible to increase the all-rail rates between Cincinnati and Louisville, respectively, and Nashville, materially, above what they are at present.

XII.

Respondents aver that there are no regular lines of water transportation from said eastern seaboard cities to Chattanooga, and no effective competition by any water lines between said eastern seaboard cities and Chattanooga.

Respondents aver that there is no such all-water competition or all-rail competition, or part-rail and part-water competition between said eastern seaboard cities and Chattanooga, as exists between said eastern seaboard cities via Cincinnati and Louisville and thence to Nashville.

Respondents aver that there is no such water competition between Cincinnati, Louisville, Evansville, Paducah and New Orleans, on the one side, and Chattanooga on the other, as there is between said cities and Nashville.

XIII.

Respondents aver that the rates from said eastern seaboard cities to Chattanooga are just and reasonable in and of themselves;
147 and that said rates are just and reasonable as compared with the rates from said eastern seaboard cities to Atlanta, and other cities located similar to Chattanooga, and in the same section of country. Chattanooga has the same rates from said eastern seaboard cities as Atlanta, though Atlanta is 138 miles nearer than Chattanooga to the seacoast.

The rates from said eastern seaboard cities to Chattanooga are the same as rates from said eastern seaboard cities to Anniston, Alabama; Athens, Georgia; Birmingham, Alabama; Cedartown, Georgia; Columbus, Georgia; Dalton, Georgia; Montgomery, Alabama; Eufaula, Alabama; Rome, Georgia; Selma, Alabama; Meridian, Mississippi; Opelika, Alabama; and Talladega, Alabama. Respondents submit that it would not be just or reasonable to reduce the rates from said eastern seaboard cities to Chattanooga unless the rates were also reduced from said eastern seaboard cities to the other above-mentioned cities which have heretofore had the same rates as Chattanooga; and none of such cities were represented before the Interstate Commerce Commission, nor before this court, in this case.

XIV.

Respondents aver that the rates charged from said eastern seaboard cities to Chattanooga and to Nashville, respectively, do not constitute any unjust discrimination or undue preference in favor of Nashville against Chattanooga. The rates from said eastern seaboard cities to Cincinnati, Louisville and Evansville, respectively, are lower than from said eastern seaboard cities to Nashville; and upon freight transported from said eastern seaboard cities through Chattanooga to Nashville, and thence to Cincinnati, Louisville and Evansville, respectively, the distance is less from said eastern seaboard cities to Nashville than to Cincinnati, Louisville and Evansville, respectively.

The rates from said eastern seaboard cities to Cincinnati, Louisville and Evansville, respectively, are made by the trunk-line roads above referred to, which do not operate through Chattanooga, and which therefore would not be subject to the operation of the 4th section of the act to regulate commerce so far as traffic passing from said eastern seaboard cities through Chattanooga to Ohio River points is concerned. It would therefore be unjust and unreasonable to compel defendants to raise the rates from said eastern seaboard cities via Chattanooga to Nashville, and thereby
148 increase the disadvantage under which Nashville labors, as compared with cities located on the Ohio river, unless the rates from said eastern seaboard cities to said cities on the Ohio river were also raised.

XV.

Whenever Nashville merchants attempt to sell goods North or West, or on the upper or lower Cumberland river, they meet active competition from the merchants of Cincinnati, Louisville, Evansville, and other Ohio River cities, including even St. Louis, Missouri.

Said trunk-line rates from said eastern seaboard cities to Cincinnati, Louisville, and other Ohio River points are made relative to the rates which obtain between said eastern seaboard cities and Chicago; and the rates which obtain between said eastern seaboard cities and Chicago are controlled by the all-water line via the lakes, the Erie canal, and the Hudson river. It is practically impossible to increase the rates between said eastern seaboard cities and Cincinnati, Louisville and other Ohio River cities, without increasing in the same proportion the rates from said eastern seaboard cities to Chicago; and said rates cannot be materially increased from said eastern seaboard cities to Chicago above the rates which obtain upon the water line aforesaid.

The defendants in this case would be more than willing to increase the rates between said eastern seaboard cities and Nashville to those which now obtain between said eastern seaboard cities and Chattanooga if it were possible to do so; but owing to the competitive circumstances and conditions above stated, it is utterly

impossible to increase the rates from said eastern seaboard cities to Nashville materially above what they now are.

If, therefore, the order made by the Interstate Commerce Commission in this case is to be enforced, the only result will be to prevent respondents and their connections working through Chattanooga from participating in the traffic between said eastern seaboard cities and Nashville; it will injure respondents and said connections to the extent of many thousands of dollars per annum, and yet it will be of no benefit whatever to Chattanooga or its merchants.

Respondents having fully answered, pray to be hence dismissed with their reasonable costs, &c.

ED. BAXTER,
Solicitor for the Norfolk & Western Railway Company and the Old Dominion Steamship Company.

149 STATE OF NEW YORK, } ss:
County of New York, }

Personally appeared before me, Joseph J. Sullivan, a notary public, duly appointed and qualified in and for said State and county, Henry Fink, the president of The Norfolk & Western Railway Company, one of the above-named respondents, and made oath that the facts stated in the foregoing answer are true to the best of his knowledge, information, remembrance and belief, and in testimony that the foregoing is the answer of said company he affixed thereto the seal of said company.

[N. & W. SEAL.] HENRY FINK.

Attest: A. J. HEMPHILL, *Secretary.*

Sworn to and subscribed before me this 24th day of October, 1896.

[SEAL.] JOSEPH J. SULLIVAN,
Notary Public, Kings & N. Y. Co.

STATE OF NEW YORK, }
County of New York. }

Personally appeared before me, E. H. Patton, a notary public, duly appointed and qualified in and for said State and county, W. L. Guillaudeau, the vice-pres't & traffic manager of The Old Dominion Steamship Company, one of the above-named respondents, and made oath that the facts stated in the foregoing answer are true to the best of his knowledge, information, remembrance and belief; and in testimony that the foregoing is the answer of said company, he affixed thereto the seal of said company.

[Seal of Old Dominion Steamship Company.]

W. L. GUILLAUDEAU.

Sworn to and subscribed before me this 2nd day of November, 1896.

E. H. PATTON,
[SEAL.] *Notary Public No.* 66, *N. Y. County.*

And on the same day, to wit, the 14th day of November, 1896, a certain stipulation was filed in the clerk's office of said court, which said stipulation is clothed in the words and figures following, to wit:

Stipulation.

(Endorsed:) Filed Nov. 14, 1896. Henry O. Ewing, Clerk.

150 In the Circuit Court of the United States for the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY Company *et al.* } In Equity.

In this case it is stipulated and agreed that after the petition was filed in this case, to wit: on February 6th, 1895, F. J. Kimball and Henry Fink, under certain foreclosure proceedings, were appointed receivers of the Norfolk & Western railroad in the States of Virginia, West Virginia, North Carolina and Maryland; and on February 7th, 1895, said Fink was appointed receiver of said road in Ohio.

Said road, with the exception of the Roanoke & Southern and the Scioto Valley division from Coal Grove to Columbus, was sold under said foreclosure proceedings September 15th and 16th, 1896, to the Norfolk & Western Railway Company, by whom possession was taken on September 30th, 1896.

It is further stipulated and agreed that this cause may be revived against said Norfolk & Western Railway Company and stand in the same plight and condition as it was in when said company acquired said Norfolk & Western railroad; but it is also agreed that said Norfolk & Western Railway Company shall have the right in its answer and at the hearing to rely upon all defenses that could have been made by said Norfolk & Western Railroad Company and that it shall also have the right to insist that it is not responsible for violations of law, if any may have been committed by said Norfolk & Western Railroad Company, or by the receivers thereof before said Norfolk & Western Railway Company acquired said railroad. It is further agreed that it has not complied with the order of the commission involved in this cause, but has knowingly acted in violation thereof since it has succeeded to the title and operation of said railroad.

This 6th day of November, 1896.

L. A. SHAVER,
Of Counsel for Interstate Commerce Commission.
ED. BAXTER,
Solicitor for Norfolk & Western Railway Co.

151 And afterwards, to wit, on the 20th day of November, A. D. 1896, an entry was made upon the journal of said court, which said entry is clothed in the words and figures following, to wit:

Journal "E," page 526, November 20th, 1896.

THE INTERSTATE COMMERCE COMMISSION
vs.
E. T., V. & G. R'Y CO. ET AL.

Pursuant to the stipulation of counsel, dated Nov. 6th, 1896, and filed in this cause, it is ordered and decreed by the court that this cause be revived against the Norfolk and Western Railway Company and stand in the same plight and condition as it was when said company acquired the Norfolk & Western railroad.

And afterwards, to wit, on the 16th day of June, A. D. 1897, a stipulation as to testimony was filed in the clerk's office of said court, which said stipulation is clothed in the words and figures following, to wit:

Stipulation as to Testimony.

(Endorsed:) Filed June 16, 1897. Crawford T. Johnson, Dep. Cl'k.

In the Circuit Court of the United States, Eastern District of Tennessee, in Equity, at Chattanooga, Tennessee.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA & GEORGIA R'Y CO. *et al.* } No. 384.

In this case it is stipulated and agreed by counsel for both parties, that the testimony of witnesses taken before the Interstate Commerce Commission in the case of The Board of Trade of Chattanooga *vs.* The East Tennessee, Virginia & Georgia R'y Co.
152 *et al.*, and such tariffs and other documents as were used by the commission as a basis for the report and opinion of the commission in said case, which was decided December 30th, 1892, may be certified by the secretary of the Interstate Commerce Commission, and filed and used in this case as evidence, subject to objection by either party as to the competency or relevancy of any part thereof; but all formal objections are hereby waived.

This 7th day of June, 1897.

ED. BAXTER,
Solicitor for Defendants as of Record.
L. A. SHAVER,
Solicitor for the Interstate Commerce Commission.

And afterwards, to wit, on the 22nd day of June, A. D. 1893, a stipulation of counsel was filed in the clerk's office of said court, which said stipulation is clothed in the words and figures following, to wit:

Stipulation of Counsel.

(Endorsed:) Filed June 22, 1897. Crawford T. Johnson, Dep. Cl'k.

In the Circuit Court of the United States for the Eastern District of Tennessee, in Equity, at Chattanooga.

INTERSTATE COMMERCE COMMISSION
vs.
EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY CO. ET AL.

Stipulation.

In the above case it is stipulated and agreed by counsel as follows: Either party on the hearing of the above-mentioned case in United States circuit court may use as evidence extracts from rates on file with the Interstate Commerce Commission extracts from annual reports filed by carriers with said commission and extracts from statistical or other data compiled by, or on file in the offices of the statistician and auditor of said commission, subject to objection by either party as to its competency or relevancy; but all formal objections are waived. Copies of such extracts as may be intended to be used by either party shall be certified by the
153 secretary of said commission, and furnished to the opposite party, who shall have fifteen days thereafter in which to file counter extracts or testimony.

June 19, 1897.

L. A. SHAVER,
Solicitor for Interstate Commerce Commission.
ED. BAXTER,
Solicitor for Defendants as of Record.

And afterwards, to wit, on the 9th day of August, A. D. 1897, the depositions of G. P. Biles, J. M. Brown, J. M. Culp, T. S. Darant, T. M. Gallagher, W. L. Guillanden, G. R. Knox, R. E. Lutz, Y. Vanden Berg, W. A. Winburn were filed in the clerk's office of said court, which said depositions are clothed in the words and figures following, to wit:

Depositions of G. P. Biles.
J. M. Brown.
J. M. Culp.
T. S. Darant.
T. M. Gallagher.
W. L. Quillanden.
G. R. Knox.
R. E. Lutz.
Y. Vanden Burg.
W. A. Winburn.

(Endorsed:) Filed August 9th, '97. Crawford T. Johnson, Dep. C.

In the Circuit Court of the United States for the Eastern District of Tennessee, at Chattanooga.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILway Company *et al.* } In Equity.

Frank Lyon, stenographer, 1317 F St., N. W., Washington, D. C.

154 In the Circuit Court of the United States for the Eastern District of Tennessee, in Equity, at Chattanooga, Tennessee.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY Company *et al.* } No. 384.

In this case it is stipulated and agreed by counsel for the complainant and counsel for the defendants, that Frank Lyon, stenographer, shall act as a special examiner, with all the powers of such, to take the depositions of such witnesses in this case as may be produced before him by defendants.

It is further stipulated and agreed that he shall take the testimony of such witnesses in shorthand, and afterwards reduce the same to typewriting, and certify that his report of the testimony is full, true and correct. The signatures of the witnesses to their testimony, and all formal caption and certificate are expressly waived.

June 22nd, 1897.

L. A. SHAVER,
Counsel for Complainant.
ED. BAXTER,
Solicitor for Defendants.

Y. VAN DEN BURG, a witness called on behalf of the defendants, having been duly sworn, testified as follows:

Direct examination.

By Mr. BAXTER:

Q. 1. State your name, age, residence and occupation.

A. Y. Van Den Burg; 41 years of age; residence, Louisville, Kentucky; traffic manager of the Louisville & Nashville Railroad Company.

Q. 2. How long have you been connected with the traffic departments of railroads in the United States?

A. Since 1880.

Q. 2½. In the report and opinion of the commission in this case, filed in December, 1892, it is stated that the rates from New
155 York via Cincinnati to Nashville, are made by arbitrary additions to the trunk-line rates from New York to Cincinnati

Is it correct or not to characterize the additions from Cincinnati to Nashville as arbitrary?

A. No, sir; the rates are not so made.

Q. 3. In dividing the rates from New York via Cincinnati to Nashville, how did the revenue per ton per mile received by the Louisville & Nashville railroad in 1892 from Cincinnati to Nashville compare with the revenue per ton per mile received by its connections north of Cincinnati?

A. After deducting cost of transfers, the earnings of the Louisville & Nashville railroad per ton per mile are approximately the same as the connections up to Cincinnati.

Q. 4. What do you mean by deducting the cost of transfers?

A. There are some transfers at New York, terminal expenses at New York and also the Ohio River transfer at Cincinnati.

Q. 5. And the transfers both at New York and at the Ohio river are deducted before dividing the balance between the Louisville & Nashville railroad and its connections between the Ohio river and New York?

A. Yes, sir.

Q. 6. Please explain when through rates from New York to Nashville via Cincinnati were first fixed and promulgated and state the reasons which governed in fixing those rates?

A. The first through rates from New York to Nashville were promulgated about 15 years ago, and in arbitrarily fixing those rates, they were made in relation to the rates from New York to the Ohio River crossings—Louisville and Evansville and Memphis, Tennessee.

Q. 7. Explain why it was necessary to make rates from New York to Nashville relative to the rates from New York to Memphis, Evansville and Louisville.

A. Because Nashville is a distributing point for the same territory for which Memphis, Evansville and Louisville are distributing points.

Q. 8. Explain how it is that lower rates are carried from New York via Cincinnati to Nashville than from New York via Cincinnati to Memphis.

A. The rates from New York to Memphis are so adjusted that the business is divided between the coastwise lines to New Orleans and the Mississippi River boats from New Orleans to Memphis, and the rail lines from New Orleans to Memphis; while the rates to
156 Nashville are so adjusted as to about absolutely control the entire movement to the rail lines into that point.

Q. 9. What proportion of the tonnage from New York and other eastern cities to Memphis reaches Memphis via New Orleans?

A. Over half of it.

Q. 10. What proportion of the tonnage from New York and other eastern cities to Nashville reaches that point via Cincinnati or other Ohio River points, and what proportion of it reaches Nashville via Chattanooga?

A. I do not know that I can give an estimate of that, but the vast majority of the traffic reaches Nashville via Chattanooga.

Q. 11. Suppose the rates from New York via Cincinnati to Nash-

ville were advanced so as to be made the same as the rates from New York via Cincinnati to Memphis, what effect would it have towards diverting the traffic to the steamboat lines from Evansville to Nashville?

A. It would divert a portion of the traffic to the trunk lines via Evansville and the direct boats from Evansville to Nashville.

Q. 12. State whether or not there is any competition as between Nashville on the south and Evansville and Louisville on the north, and what effect would be produced upon the commerce of Nashville as compared with the commerce of Louisville and Evansville of the rates from New York via Cincinnati to Nashville were advanced so as to be made the same as the rates from New York via Cincinnati to Memphis.

A. Nashville, as I have stated, is a strong point of competition, and in the same territory to which Evansville and Louisville distribute. The rates from New York are as follows:

Class	1.	2.	3.	4.	5.	6.	
To Louisville	75	65	50	35	30	25	(cents.)
To Evansville	83	72	55	39	33	28	"
To Nashville	91	78	60	42	36	31	"

Nashville is only 155 miles south of Evansville and 185 miles south of Louisville, and to advance the rates from New York to Nashville to the same as the rates from New York to Memphis, would deprive Nashville from competing in the territory in which it now competes with Evansville and Louisville.

157 Q. 13. By what lines were the rates from New York and eastern cities to Nashville primarily made, and by what lines were the rates from New York and eastern cities to Chattanooga primarily made?

A. The rates from eastern cities to Nashville were primarily made by the lines through the Ohio River crossings and the rates from the eastern cities to Chattanooga were made by the lines through Virginia gateways.

Q. 14. In adjusting the rates from New York and other eastern cities to Chattanooga, what southern cities were considered in connection with Chattanooga, and in adjusting the rates from New York and other eastern cities via Cincinnati to Nashville, what other cities near Nashville were considered in connection with Nashville?

A. In fixing the rates from eastern cities to Chattanooga, Rome, Dalton, Atlanta, Birmingham and other points were considered as competing with Chattanooga in the same territory, and in fixing the rates to Nashville, Louisville, Evansville and Memphis were considered as competing with Nashville in the same territory.

Q. 15. State how the through rates in force in 1892 from New York and Boston to Nashville were divided between the trunk lines and the Louisville and Nashville. Please state the actual divisions via the different lines on each of the classes.

A. Via the Empire and Union lines the rates from Boston to Nashville were divided as follows:

First class:

To Cincinnati	67.4
South	23.6
Through	91.

Second class:

To Cincinnati	57.4
South	20.6
Through	78.

Third class:

To Cincinnati	43.7
South	16.3
Through	60.

158 Fourth class:

To Cincinnati	29.9
South	12.1
Through	42.

Fifth class:

To Cincinnati	25.3
South	10.7
Through	36.

Sixth class:

To Cincinnati	21.5
South	9.5
Through	31.

From New York via the same line.

First class:

To Cincinnati	64.1
South	26.9
Through	91.

Second class:

To Cincinnati	54.6
South	23.4
Through	78.

Third class:

To Cincinnati	41.5
South	18.5
Through	60.

Fourth class:

To Cincinnati	29.4
South	13.6
Through	42.

159 Fifth class:

To Cincinnati	24.
South	12.
Through	36.

Sixth class:

To Cincinnati	20.4
South	10.6
Through	31.

From Boston via the New York Central, Lake Shore, & Michigan Southern and Big Four roads.

First class:

To Cincinnati	66.4
South	24.6
Through	91.

Second class:

To Cincinnati	56.5
South	21.5
Through	78.

Third class:

To Cincinnati	43.
South	17.
Through	60.

Fourth class:

To Cincinnati	29.4
South	12.6
Through	42.

Fifth class:

To Cincinnati..... 24.9
South..... 11.1

Through..... 36.

160 Sixth class:

To Cincinnati..... 21.1
South..... 9.9

Through..... 31.

From New York via the same route.

First class:

To Cincinnati..... 66.1
South..... 25.9

Through..... 91.

Second class:

To Cincinnati..... 55.5
South..... 22.5

Through..... 78.

Third class:

To Cincinnati..... 42.4
South..... 17.6

Through..... 60.

Fourth class:

To Cincinnati..... 28.9
South..... 13.1

Through..... 42.

Fifth class:

To Cincinnati..... 24.4
South..... 11.6

Through..... 36.

Sixth class:

To Cincinnati..... 20.7
South..... 10.3

Through..... 31.

161 Q. 16. State whether freight from New York and other eastern cities via Cincinnati to Nashville is carried under the same classification as the freight from New York and other eastern cities to Chattanooga? State how the official classification compares with the Southern Railway and Steamship Association classification.

A. The rates from eastern cities to Nashville are governed by the official classification. The rates from the eastern cities to Chattanooga are governed by the southern classification. It is impossible to make a comparison as between the official and the southern classifications, but when an effort was made some years ago to harmonize the two classifications and adopt a uniform classification the southern classification was considered one class below the official classification. In other words an article taking second class in the official classification was considered to be rated third class in the Southern Railway and Steamship classification.

Q. 17. State whether it was possible for the trunk lines and the Louisville & Nashville Railroad Company in 1892 to obtain any higher rates from New York and Boston to Nashville via Cincinnati than those that were charged then.

A. No, sir; I do not think it would have been possible to have charged higher rates without depriving Nashville of a considerable portion of its business.

Q. 18. The distance from New York via Bristol to Chattanooga is 901 miles; the rates from New York to Chattanooga in 1892 were reported by the commission as follows:

Class.....	1.	2.	3.	4.	5.	6.
	1.14	.98	.86	.73	.60	.49

State whether in your opinion said rates were reasonably low or unreasonably high, and give your reasons for any opinion you may express.

A. I think the rates were reasonsable in and of themselves for the reason that the rates from eastern cities to Chattanooga are fixed not higher than the rates to Rome, Dalton, Atlanta, Birmingham, and other points in that section, thus enabling Chattanooga to compete with points in that same territory.

Q. 19. Please select two average months in 1892 and state the number of tons of each of said classes of freight shipped from New York to Boston via Cincinnati destined to Nashville that were carried one mile by the Louisville and Nashville Railroad Company during these months.

Counsel for the commission objects to this question on the ground of irrelevancy.

162 A. I submit as Exhibit No. 1 to my deposition, statement, showing classes of freight (official classification) and commodities separate, shipped from Boston and New York via Cincinnati, Ohio, to Nashville, Tennessee, during the months of May and November, 1892; also showing number of tons carried one mile for

each class and commodity. Said statement was prepared at my request by Mr. Dickinson, auditor of receipts of the Louisville & Nashville Railroad Company.

Counsel for commission objects to the statement on the ground of irrelevancy and also because it is hearsay.

Q. 20. Who keeps the accounts of the Louisville & Nashville Railroad Company showing the numbers of tons of each of the classes of freight carried one mile?

A. Mr. Dickinson, the auditor of the company.

Q. 21. How many clerks has he in his employ?

A. He has a small army of them. I do not know how many there are.

Q. 22. How many books are required?

A. A great many books. I do not know how many.

Q. 23. Is he or not an officer subject to your orders for any information you may desire him to give?

A. He is.

Q. 24. Did you direct him to prepare the statement filed as Exhibit No. 1 to your deposition?

A. I did, sir.

Q. 25. And that statement is the result of what you directed him to compile?

A. Yes, sir.

Mr. SHAVER: You did not compile it yourself?

A. No, sir.

Mr. SHAVER: You did not see him compile it?

A. No, sir; the statement is certified to by him, however, as correct.

Mr. SHAVER: You do not of your own knowledge know of the correctness of those figures in that statement?

A. No, sir.

Q. 26. The commission, in its report and opinion in this case says that "under the tariffs now in force goods may be carried from the East through Chattanooga to Nashville and back through Chattanooga to points South and East and there sold at a lower price than Chattanooga merchants can sell for, and this appears to have actually occurred in many instances?"

Please state if you have caused to be prepared a statement showing the comparative combinations of rates on the articles that
163 actually moved from the East to Chattanooga and Nashville to stations on the Nashville, Chattanooga and St. Louis railway, Memphis and Charleston railroad, Southern railway (east of Chattanooga), Alabama Great Southern railway, Chattanooga Southern railway, Chattanooga, Rome & Columbus railway, Southern railway (south of Chattanooga), Western and Atlantic railway, and the Cincinnati, New Orleans & Texas Pacific railway. If so, please file said statement as Exhibit No. 2 to your deposition and state the result of the comparisons contained in it?

A. I will file it as Exhibit No. 2.

Q. 27. Did you cause that statement to be prepared?

A. Yes, sir, I had this statement prepared, taking at random eight of the commodities that regularly move from eastern cities to Chattanooga and Nashville, and also taking at random points of destination, preparing the statement just as the traffic moves, that is car-loads into Nashville and Chattanooga, where car-load rates are established, and less than car-load rates out. That statement shows not only that the commission's assertion that the rates south, east and west of Chattanooga can be made on Nashville combination lower than Chattanooga, is erroneous, but shows that even to points north of Chattanooga, the combinations figure in favor of Chattanooga. Take, for instance, a point between Chattanooga and Nashville on the Nashville and Chattanooga road, Decherd, which is 82 miles from Nashville and 68 miles from Chattanooga (pretty nearly half way) and even to that point out of eight combinations, four of them figure in favor of Chattanooga. The whole statement shows 168 combinations, only 12 of which base on Nashville and 156 on Chattanooga.

I file this statement in my deposition as Exhibit No. 2.

Cross-examination.

By Mr. SHAVER:

Q. 1. Did you prepare this Exhibit No. 2 yourself?

A. No, sir, I had it prepared by the chief clerk in the general freight office.

Q. 2. Did you see him prepare it?

A. No, sir.

Q. 3. Did you, of your own personal knowledge know the correctness of this statement Exhibit No. 2?

A. No more than any other statement that I have made up by the general freight office. I might add that the commission is in possession of the tariffs on file to check those off.

Counsel for the commission objects to this statement on the ground that it is hearsay and irrelevant.

164 Q. 4. You say, I believe, that out of a certain number of combinations, the majority are based on Chattanooga?

A. Out of 168, 156 based on Chattanooga.

Q. 5. The rates to these 156 stations are made up then of the through rates from New York to Chattanooga plus the local rates on from Chattanooga to these stations?

A. Yes, sir.

Q. 6. And the rates to the other stations are made up of the through rates to Nashville plus the locals back?

A. Yes, sir.

Q. 7. Back from Chattanooga or Nashville?

A. Yes, sir.

Q. 8. You stated in answer to direct interrogatory three (3) that the rates from New York via Cincinnati to Nashville were not made up of the through rate to Cincinnati plus an arbitrary on to Nashville?

A. Yes, sir.

Q. 9. Those rates are made up of the through rate to Cincinnati plus the regular through rate from Cincinnati to Nashville, are they not?

A. No, sir, if the rates were made as has been ascertained by the rates from New York to Cincinnati plus the arbitraries, enumerated, the rates would so divide, and the divisions which I have given in answer to one of the interrogatories shows that the rates do not so divide.

Q. 10. In dividing the aggregate through rate, the Louisville & Nashville railroad does not get the regular rate from Cincinnati to Nashville?

A. No, sir.

Q. 10½. Is it a lower rate?

A. Considerably lower.

Q. 11. What is the regular rate charged by the Louisville & Nashville railroad from Cincinnati to Nashville?

A. It is fifty-three cents on first class.

Q. 12. What is the proportion of the through rate from New York via Cincinnati to Nashville which the Louisville & Nashville railroad receives?

A. It varies.

Q. 13. It is different on different classes?

A. No, sir, it varies according to the route. For instance, its proportion from Cincinnati to Nashville on first-class business in connection with Union and Empire lines is 26.9. Its proportion south of Cincinnati on business from New York in connection with the New York Central and the Lake Shore and the Michigan Southern and Big Four roads is 25.9.

Q. 14. You stated that after deducting terminal expenses,
165 the rate per ton per mile from Cincinnati to Nashville was not higher than the rate per ton per mile for the preceding portion of the haul from New York to Cincinnati?

A. I testified that the revenue of the Louisville & Nashville Railroad Company per mile was approximately the same as that of the connections up to Cincinnati.

Q. 15. Is it not less?

A. It may be less in some cases where constructive mileage has been adopted east of Cincinnati.

Q. 16. The terminal expenses are at Cincinnati and New York, I believe?

A. Yes, sir, the Ohio River transfers at Cincinnati and the terminal expenses at New York.

Q. 17. Are not those terminal expenses deducted from the aggregate rate and not from the proportion of the rate going to the Louisville & Nashville railroad?

A. No, sir, the expenses are deducted from the total rate.

Q. 18. Are not rates, as a general rule, higher per ton per mile south of the Ohio than north or in trunk-line territory?

A. Yes, sir.

Q. 19. Are the rates in this instance from Cincinnati to Nashville an exception to that rule?

A. Well, I would have to figure on that, Mr. Shaver.

Q. 20. You also stated in your direct examination that the rates from New York to Memphis are higher than those to Nashville, I believe?

A. Yes, sir.

Q. 21. That is so, notwithstanding the fact that Memphis is on the Mississippi river and has all water communication with New York and other northeastern cities?

A. I explained that under the adjustment of rates to Memphis over half of the business is carried by coastwise lines through New Orleans, while under the adjustment of rates to Nashville more of the traffic is controlled by the rail lines into Nashville, and if the rates to Nashville are made the same as to Memphis, it would lead to a division of traffic between the water and the rail lines the same as is the case at Memphis.

Q. 22. You stated that a vast majority of the traffic from New York to Nashville passes through Chattanooga?

A. Yes, sir.

Q. 23. Could you state the proportion, approximately?

A. I could not.

Q. 24. You stated that if the rates to Nashville were as high as those to Memphis from New York and other northeastern
166 cities that the result would be that the traffic would be diverted at Cincinnati from the rail lines to the river and would be transported via the Ohio and Cumberland rivers to Nashville?

A. No, sir. I stated that to make the rates from New York to Nashville as high as from New York to Memphis, would lead to a diversion of the traffic from the Cincinnati route in connection with the Louisville & Nashville route to the Evansville crossing in connection with the direct steamers from Evansville to Nashville.

Q. 25. On the Cumberland river?

A. Yes, sir, the Ohio and Cumberland rivers.

Q. 26. How many rail, or rail and water lines are there from New York to Chattanooga?

A. The all-rail lines are the Pennsylvania railroad in connection with the Alexandria and Hagerstown routes; the Jersey Central and the Baltimore and Ohio in connection with the same routes; the Old Dominion Steamship Company and other crafts from New York to Norfolk and Portsmouth in connection with the rail lines from those ports; the direct steamer lines from New York to Charleston, Savannah and Brunswick in connection with the rail lines from those ports. There may be others.

Q. 26. Goods can also be transported from New York by water to New Orleans and thence up the Mississippi river to Memphis, and thence to Chattanooga by rail, can they not?

A. I do not know of any such movement.

Q. 27. It could be?

A. There might be upon some terms. I do not think there could be upon the adjustment of rates in force.

Q. 28. Are there not more rail lines or lines of transportation to Chattanooga than to Nashville?

A. No, sir, lines that compete to Chattanooga all compete for Nashville traffic as well.

Q. 29. How many railroads enter Nashville?

A. There are two lines—the Louisville and Nashville railroad and the Nashville, Chattanooga and St. Louis railroad.

Q. 30. How many railroads enter Chattanooga?

A. At Chattanooga there is the Western and Atlantic; the Cincinnati Southern; the Alabama Great Southern; the Nashville, Chattanooga and St. Louis railroad; the Chattanooga, Rome & Columbus; the Memphis and Charleston; the Chattanooga Southern.

Q. 31. There are more railroads then entering Chattanooga than enter Nashville, are there not?

A. Yes, sir.

167 Q. 32. Are you familiar with the navigability of the Cumberland river from Smithland where it empties into the Ohio to Nashville?

A. Yes, sir, I am familiar with it. They run regular boats between Paducah and Nashville; also between Evansville & Nashville, except possibly for short periods owing to exceptionally low water.

Q. 33. How many months in the year do those periods last?

A. There are only about sixty days in the year that those boats do not give us trouble. They are very light-draft boats.

Q. 34. Light-draft boats?

A. Yes, sir.

Q. 35. Is it navigable only for light-draft boats during the entire year?

A. It is only sixty days in the year that we do not have to contend with that Cumberland River competition, and sometimes considerably less than that.

Q. 36. When goods are shipped from New York via Cincinnati and thence via the Ohio and Cumberland rivers to Nashville, is not a transfer of the goods necessary at Cincinnati from the cars to the boat?

A. I do not think they handle any freight from New York to Nashville via Cincinnati and the Ohio river, but it is practicable. But the handling of traffic from New York to Evansville and thence by boats is entirely practicable and the railroads entering Evansville have got their rails up to the levee.

Q. 38. There is a transfer at Evansville from the cars to the boat?

A. I do not so understand, sir.

Q. 39. The cars themselves are transferred?

A. Yes, sir.

Q. 40. They can reach the river?

A. Yes, sir.

Q. 41. Put on board the boat?

A. Yes, sir.

Q. 42. Carried to Nashville?

A. Carried to Nashville by direct boat—a 400-ton boat. The cars are switched over the track connection to the water's edge.

Q. 43. You mean then that the cars are carried to the water's edge and the goods taken from the cars and put aboard the boat?

A. Yes, sir.

Q. 44. What is the distance from Evansville by the Ohio and Cumberland rivers to Nashville?

A. I do not know.

168 Q. 45. Can you approximate it?

A. No, sir.

Q. 46. What is the distance by direct rail lines from Evansville to Nashville?

A. 155 miles.

Q. 47. Are there regular through rates published and in force from New York to Nashville, by rail to Evansville and thence by the Cumberland river to Nashville?

A. No, sir; I explained in my direct testimony that under the present adjustment of rates from New York to Nashville, the Evansville route in connection with the Ohio and Cumberland rivers is not a practicable one, but that if the rates were advanced to the same figures as the rates from New York to Memphis it would be.

Q. 48. How long has it been since that route has been a practicable route from New York to Nashville?

A. I could not tell, sir.

Q. 49. What is the last through shipment that you know of from New York by rail to Evansville and thence by the Ohio and Cumberland rivers to Nashville?

A. As I explained, under the present adjustment of rates, the route through Evansville in connection with the Ohio and Cumberland rivers is not a feasible one, and I do not know when they took the last shipment.

Q. 50. Have you, of your own personal knowledge, ever known of through shipment from New York to Evansville by rail and thence by the Ohio and Cumberland rivers to Nashville?

A. No, sir.

Q. 51. In answer to the 18th direct interrogatory, you stated that the rates from New York and other northeastern cities to Chattanooga were reasonable in and of themselves, I believe?

A. Yes, sir.

Q. 52. You then went on and stated as a reason that those rates were the same as the rates to Rome, Birmingham, &c.

A. Yes, sir.

Q. 53. Do you not mean, then, that those rates are relatively reasonable as compared with the rate to Rome, Birmingham, &c.?

A. No, sir; I mean they are reasonable in themselves. Under the adjustment, Chattanooga has been able to hold its own in the same territory that Atlanta, Birmingham and Rome distribute to.

Q. 54. That would simply show that the rates were relatively reasonable, would it not?

A. Well, they are reasonable in relation to the rates to
169 Atlanta, Birmingham and Rome, but they are also reasonable in themselves. The reasonableness of them being established by the fact that Chattanooga has been able to hold its trade.

Q. 55. Did you state in reference to Exhibit No. 1, showing tonnage of freight, &c., from New York via Cincinnati to Nashville, why you selected the months of May and November, 1892?

A. They were considered average months.

Q. 56. Would the same data for other months of the year be larger or less in numbers from the data in Exhibit No. 1?

A. I think it is a fair average, sir.

Q. 57. The rate now in force from New York through Chattanooga to Nashville on first-class goods is 91 cents, is it not?

A. Yes, sir.

Q. 58. Does that rate pay operating expenses?

A. I believe it does.

Q. 59. Does it pay anything on the fixed charges such as interest on the investment, taxes, &c.?

A. I am hardly able to answer that question definitely. It is impossible to say whether a specific rate between any two points covers the cost of handling, but long experience has given us an idea as to what is fairly remunerative traffic, and I consider the business from New York to Nashville as such. I do not mean remunerative traffic, but traffic that pays over and above the cost of handling it.

Q. 60. The rate on first-class traffic from New York to Chattanooga is $1.14 per hundred pounds, is it not?

A. Yes, sir.

Q. 61. Is that rate to Chattanooga a reasonable rate in and of itself?

A. I have testified it was.

Q. 62. The haul from New York to Nashville is 151 miles longer than the haul to Chattanooga, is it not?

A. Yes, sir.

Q. 63. Is the 91-cent rate to Nashville reasonable in and of itself?

A. I think so.

Q. 64. Considered from the standpoint of the value of the service, is it not true that, if the rate to Nashville for a haul 151 miles longer than the haul to Chattanooga is reasonable in and of itself, the rate to Chattanooga for the shorter haul is unreasonably high—considered from the standpoint, as you understand, of the value of the service and cost of the service?

170 A. Considering the value of the service, I do not consider the rate from eastern cities to Chattanooga unreasonably high as compared with the rates from eastern cities to Nashville.

Q. 65. Would you consider the Chattanooga rate unreasonably high from the standpoint of the cost of service alone as compared with the Nashville rate, the haul to Nashville being 151 miles longer than the haul to Chattanooga?

A. I would not, sir.

Q. 66. How do you determine whether a given rate is reasonable or unreasonable?

A. If a point under any prevailing adjustment of rates is able to hold and develop its trade, I regard such an adjustment of rates as reasonable.

Q. 67. Is a rate reasonable which does not yield the carrier a proper remuneration over and above the cost of service?

A. I do not believe carriers make rates below the cost of transportation. I would consider such a rate as unreasonably low.

Q. 68. It would not, then, be a reasonable rate unless it yielded a proper remuneration over and above the cost of service?

A. It would be an unreasonably low rate.

Q. 69. Is not therefore the expense of cost of the service an element to be considered in determining the reasonableness in and of itself of a given rate?

A. I presume when you get rates down to a certain point that element would be considered a factor.

Q. 70. Does not the cost or the expense of the service of transportation depend largely or to some extent on the length of the haul, other things being equal?

A. Distance is a factor, but not a controlling one.

Q. 71. Other things being equal, is not the consumption of time greater, the greater the length of the haul?

A. Not necessarily. Through traffic for the longer haul is handled in less time than local traffic for the shorter haul.

Q. 72. I stated, other things being equal; that is, the same rate of speed for the long haul as for the short haul, is not the consumption of time greater, the greater the distance?

A. The consumption of time is a factor in the expense, of course, like everything else is.

Q. 73. Other things being equal, is not the consumption of fuel greater, the greater the length of the haul?

A. It is one of the items of expense.

171 Q. 75. Is not the wear and tear on locomotives, cars, tracks, road-bed, etc., greater, the greater the length of the haul?

A. That is another item of expense.

Q. 76. Is not the cost of keeping the road in repair or in good condition greater, the greater the length of the road other things being equal?

A. Yes, sir; the longer the road, the larger the total expense of maintaining the road.

Q. 77. Does it not require more locomotives, cars and more crews for the running of trains on a long road than on a short one, as a general rule?

A. That depends largely on the amount of traffic you have got to handle.

Q. 78. Other things being equal, does not distance add to the cost of building the road and are not, therefore, the fixed charges such as interest on the capital invested, greater, the greater the length of the road?

A. It costs more to build a five-hundred-mile road than a fifty-

mile road, and the fixed charges on a 500-mile road would be greater than on the 50-mile road, although the charges may not be greater per mile.

Q. 79. Is not the service more valuable to the shipper the greater the length of the haul? In other words will not a haul of 100 miles give a shipper markets for goods or produce which he will not have in a haul of fifty mile?

A. If you mean by that that a hundred-mile road to a shipper at Nashville for the distribution of his merchandise is of more value than a road only fifty miles in length for instance, that is true.

Q. 80. Are not the rates by all the rail lines from New York to Nashville the same?

A. Yes, sir.

Q. 81. Have not those rates been established by agreement between those lines?

A. I do not understand the rates from eastern cities to Nashville were originally made by agreement. Those rates were made by the trunk lines in connection with the Louisville & Nashville road from Cincinnati, and competing lines through other gateways adopted them.

Q. 82. Are not they maintained by agreement between the different lines?

A. I may say there is a decided understanding that these rates are the rates to be maintained.

Q. 83. Were not the existing rates to Nashville and Chattanooga and other points in the territory east of the Mississippi and south of the Ohio and Potomac rivers established and maintained by what was known as the Southern Railway and Steamship Association?

172 A. Originally, yes.

Q. 84. Those same rates are still in force, are they not?

A. They are still in force.

Q. 85. What is the name of the association which succeeded the Southern Railway & Steamship Association?

A. The Louisville & Nashville Railroad Company is not a member of it. The Southern States Freight Association succeeded the Southern Railway & Steamship Association. But since the decision of the Supreme Court in the Trans-Missouri case, that has been succeeded by the Southern Association, I believe it is the Southern.

Q. 86. The same rates are still maintained?

A. The same rates that were in effect to Nashville in 1892 are still in effect.

Q. 87. Also to Chattanooga?

A. Yes, sir.

Q. 88. How long have you been engaged in the railroad business in the territory east of the Mississippi and south of the Ohio and Potomac rivers?

A. Since 1882.

Q. 89. Has the greater charge for the shorter than the longer haul over the same line in the same direction, the shorter being included in the longer, ever to your personal knowledge been made in that

territory before or since the enactment of the act to regulate commerce in 1887, except in cases of competition in transportation to the longer-distance point?

A. So far as my knowledge goes, no exception has been made in making a greater charge for the shorter than for the longer distance under similar circumstances and conditions.

Q. 90. Is not competition in transportation the only ground or reason for making a higher rate for a shorter than for a longer haul over the same line in the same direction, the shorter being included in the longer?

A. Competition is a controlling factor.

Q. 91. Is there any other factor, and if so, state it?

A. No, sir; it is the controlling factor. I do not mean by that simply the competition between carriers, but also competition between markets.

Redirect examination.

By Mr. BAXTER:

Q. 1. Please give the name and address of the person who prepared the statement filed as Exhibit No. 2 to your deposition.

A. The statement, Exhibit No. 2, was compiled under the
173 direction of D. M. Goodwin, chief clerk to the general freight agent of the Louisville & Nashville road, with headquarters at Louisville, Kentucky.

Q. 2. How many clerks has he under him?

A. Some thirty or forty—possibly more.

Q. 3. How many tariffs had to be examined by those clerks in order to make that statement?

A. The tariffs of the lines into Chattanooga and into Nashville, and all the tariffs of the roads out of Nashville and out of Chattanooga.

Q. 4. I notice that said statement shows the rates from New York to 20 named stations, and that those rates are shown first on the Nashville combination and then on the Chattanooga combination. Explain what is meant by the term combination as used in that statement.

A. That means the established rate into Nashville and into Chattanooga and the local rates out.

Q. 5. He means out of Nashville and Chattanooga, respectively, to those twenty stations, respectively?

A. Yes, sir.

Q. 6. Please examine copy of the report made by the Louisville & Nashville Railroad Company to the Interstate Commerce Commission for the year ending June 30, 1893, here shown you (exhibiting report to witness) and from page 17 state the amount of dividends declared during that year.

A. $2,112,000.

Q. 7. Refer to page 19 of the same report and state the amount of interest paid by the said company upon its funded debt during said year.

A. $4,233,978.38.

Q. 8. Refer to page 45 of said report and state the amount paid by said company during that year for operating expenses.

A. $14,670,055.07.

Q. 9. Taking the rates allowed by the Louisville & Nashville Railroad Company upon its entire line of traffic, passenger as well as freight, to and from all points and upon all the classes, is it true that the revenue derived from that total line of rates would have to be sufficient to pay the amounts shown by that report to have been paid out for dividends, interest on the funded debt and operating expenses?

A. Yes, sir.

Q. 10. Now, suppose a rate upon a particular class of traffic between any two specified points is sufficient to pay its due proportion of operating expenses and interest upon the funded debt, but
174 is not sufficient to pay its proportions of those two items, and also its proportion of the dividends, would you consider the company justified in working for that rate?

A. Yes, sir; if it paid something over and above the cost of handling.

Q. 11. Now, suppose a rate upon a particular class of traffic between particular points is not sufficient to pay its proportion of dividends or its proportion of the funded debt, but will pay more than its proportion of the operating expenses, would you decline that traffic?

A. No, sir.

Recross-examination:

Q. 1. If a given rate to a given point is not high enough to pay operating expenses on the traffic to that point, does not a part of those operating expenses have to be borne by the traffic to other points?

A. We do not mean to take business that will not pay operating expenses.

Q. 2. If a given rate to a given point does not pay operating expenses, and also something on the dividends and fixed charges, would not a part of the burden of paying those dividends and fixed charges, which ought to be borne by the traffic to that point, have to be borne by the traffic to other points?

A. I think not, sir. Where freight pays the additional expense in handling it, it is no burden upon any other traffic.

Q. 3. I asked if the payment of dividends and of interest on investment, etc., which are known, I believe, as fixed charges, if a part of that burden which ought to be borne by the traffic to a given point, the rate on which does not pay any part of that burden, would it not have to be borne by the traffic to other points?

A. I cannot answer differently from what I have done; that is, that traffic that pays the additional expense of handling is not a burden upon those items.

Q. 4. As a general rule, ought traffic to all points bear a certain proportion of the burden of the fixed charges?

A. I fancy that is the way everybody would like to have it.
Q. 5. I asked if that ought not to be the case as a general rule?
A. Well, there are exceptions to all rules, and as I said, it would be a very desirable rule.
Q. 6. That would be equitable and just, would it not?
A. Yes, sir; it would be equitable and just; but the conditi-
175 tions under my previous answer are not inequitable.

Mr. SHAVER: That is all.

Redirect examination.

By Mr. BAXTER:

Q. 1. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.
A. No, sir.

FORT MONROE, VA., *June 23rd*, 1897.

W. L. GUILLAUDEAU, a witness on behalf of the defendants, having been duly sworn, testified as follows:

Direct examination.

By Mr. BAXTER:

Q. 1. Please state your name, age, residence and occupation.
A. William L. Guillaudeau; 43; New York city; vice president and traffic manager of the Old Dominion Steamship Company.
Q. 2. How long have you been engaged in the transportation of freight traffic in the United States?
A. Nearly thirty years.
Q. 3. In what capacities?
A. All office duties from an office boy up to my present position, chiefly connected with the freight department of our company.
Q. 4. It appears from the report and opinion of the commission in this case, filed in December, 1892, that the rates from New York to Chattanooga are as follows:

Class	1	2	3	4	5	6
	1.14	.98	.86	.73	.60	.49

Please state whether, in your opinion, said rates were reasonably low or unreasonably high, and give your reasons for any opinion you may express.
A. I think the rates were reasonably low, measured by the service performed, the volume of traffic moved, and the rates to all other points similarly situated.
176 Q. 5. In the shipment of freight from New York to Nashville, and from New York to Chattanooga, what classifications apply?
A. At the present time, and I think for a long period of years to

Chattanooga, has been applied the Southern Railway & Steamship Association classification, now called the Southern States Freight Association classification, while to Nashville has been applied the trunk line or at present styled the official classification.

Q. 6. Which of these classifications is the higher? Please illustrate some of the differences between them, such as the rates on cotton piece goods, knit goods, coffees, etc.

A. The official classification rules decidedly higher, I should say. I speak of it as a whole. There are, of course, many instances where it zigzags backwards and forwards, one higher than the other, and one lower than the other, but as an instrument, the official classification is higher. For instance, cotton piece goods, that great class, which is embraced in that general term, the southern classification was for a period of years sixth class, is at present and I think for the past five or six, possibly seven years, has been fifth class on that line of goods, while the official classification was and is third class. Knit goods, I think, if my memory serves me right, are the same. Coffee and sugar and the line of goods of that sort which by the southern classification are sixth class in any quantity are fourth class in less than car-loads by the official. I have not had an opportunity and I cannot absolutely give you the full extract. I have made an extract of some of the articles which shows the difference, but it is a tremendous labor to have made an absolute exhibit of the difference between the two classifications. Yet I believe I am eminently safe in saying that the official classification rules materially higher than the southern.

Q. 7. State whether or not Chattanooga has certain lettered class rates and commodity rates from New York, which Nashville does not enjoy.

A. Chattanooga has lettered classes from A to H, if I remember right, which makes 13 or 14 classes with the six numbered classes, which Nashville has never used, never been incorporated in the official classification. Also, Chattanooga has, in common with other southern cities, had a line of so-called commodity rates, which all apply to the gross articles like groceries and what we might call heavy goods, which Nashville has not had.

Counsel for the commission objects to this testimony as irrelevant.

177 Q. 8. Are the rates on those lettered classes and the commodity rates referred to higher or lower than the rates that are charged on the same articles under the official classification, take for instance sugar, soap, glucose and molasses?

A. I think they are in every case.

Q. 9. Suppose they should be compelled to apply the same class rates to Chattanooga as obtain to Nashville and at the same time be compelled to apply the southern classification to the reduced scale of rates, what effect would it have upon the rates from New York to Nashville as compared with the rates from New York to Chattanooga?

A. In my view it would make the rates from New York to Chattanooga materially lower than the rates from New York to Nashville.

Cross-examination.

By Mr. SHAVER:

Q. 1. You stated that the rates from New York and Boston to Chattanooga on the six numbered classes were as follows:

Class	1	2	3	4	5	6
	1.14	.98	.86	.73	.60	.49

I believe, is that correct?

A. Those are the present rates and my record of the rates at the time.

Q. 2. Are not the rates from New York and Boston on a haul through Chattanooga to Nashville as follows:

Class	1	2	3	4	5	6
	.91	.78	.60	.42	.36	.31

by certain lines?

A. Yes, sir.

Q. 3. Are not those rates by all the lines from New York and Boston through Chattanooga to Nashville?

A. Yes, sir, I think so.

Q. 4. Is not the haul from New York and Boston through Chattanooga to Nashville 151 miles longer than the haul to Chattanooga?

A. I do not know the exact distance. It is longer by the distance that Nashville is from Chattanooga, yes.

Q. 5. You stated I think that the rates on certain commodities I think you mentioned sugar and molasses, etc., were lower to Chattanooga than to Nashville. Are those rates from New York, Boston and northeastern cities?

178 A. Yes, sir. I am more familiar with New York than Boston. When I answer yes as to Boston, it is generally on the proposition that the Boston rates are the same as New York. I have no interest in Boston traffic at all.

Q. 6. Why are the lettered classes or rates made lower to Chattanooga than to Nashville while the rates on the six numbered classes are made higher to Chattanooga than to Nashville? Why is that distinction made?

A. Well, I think it is a general proposition. It might be held to be for the same reason that the general scale of the southern classification is lower than the classification governing Nashville. I suppose it is the stress of competition between markets and a realization of what a force goes to make rates and classification that have brought it down. I do not know that I can answer more specifically.

Q. 7. That is a supposition—you suppose so?

A. It is my supposition founded on my experience in dealing with rates. I may say these rates have been in much the same condition for a good many years going back before I had the making of them and I answer as I understand the situation.

Q. 8. Are there not more rail lines reaching Chattanooga direct than run to Nashville?

A. More rail lines reaching Chattanooga direct? I do not think I understand the question. From where?

Q. 9. From northeastern cities.

A. No, I should think not.

Q. 10. What railroads run to Chattanooga, in all directions?

A. I have in my mind the old East Tennessee, Virginia & Georgia; now the Southern railway; the Western & Atlantic; the Memphis & Charleston. You will have to prompt me, I guess, I do not remember any more.

Q. 11. Can you state what railroads run to Nashville?

A. The Nashville, Chattanooga & St. Louis; I think the Louisville & Nashville. That is all I can think of.

Q. 12. Is there not as much competition in the transportation to Chattanooga of goods covered by the six numbered classes as there is in the transportation of the commodities you have named as being in the lettered classes?

A. That is a hard question to answer. The commodities in the lettered classes and the specific commodities that have been taken entirely outside of all classes, I should think would form the larger volume of the traffic and that might answer the question as to the competition in it. It is fair to say, however, that the enormous tonnage in the lettered classes, like meat and grain products,
179 does not move from the East. I think it might be fair to answer that there is as much competition in the lettered classes as there is in the others from the East.

Q. 13. Are the rates from New York to Nashville, which I have named, unreasonably low considered from the standpoint of the value and cost of the service on a haul from New York through Chattanooga to Nashville?

A. I think so.

Q. 14. Do those rates pay the fixed charges?

A. I cannot tell, sir; I do not know.

Q. 15. How do you determine whether a given rate is reasonable or unreasonable?

A. Well, naturally I think about rates based on our own rates, what may be called local business between New York and Norfolk.

Q. 16. Is a rate reasonable which does not yield a carrier a proper remuneration over and above the cost of service of carriage?

A. No, sir, it is not.

Q. 17. Is not the expense of the service of carriage an element to be considered in determining what is a reasonable rate?

A. I think so.

Q. 18. Does not the cost of the expense of the service of transportation depend largely or to some extent on the length of the haul, other things being equal?

A. I should say so.

Q. 19. Other things being equal is not the consumption of time greater, the greater the length of the haul?

A. Yes, sir.

Q. 20. Other things being equal, is not the consumption of fuel greater, the greater the length of the haul?

A. Yes, sir.

Q. 21. Is not the wear and tear on locomotives, cars, track and road-bed, greater, the greater the length of the haul?

A. I do not know. I have no experience with railroads, but I should say so.

Q. 22. Is not the cost of keeping the road in repair or in good condition, greater, the greater the length of the haul?

A. I cannot answer that for the same reason.

Q. 23. Does it not require more locomotives and cars and more crews for the running of trains on a long road than on a short road?

A. I make the same answer. You have in mind I am entirely a steamship man. I have no connection with railroads.

180 Q. 24. Does not distance add to the cost of building a road and are not therefore the fixed charges, such as interest on capital invested, greater, the greater the length of the road?

A. I should say it did, but I am not an expert on those questions, I do not know.

Q. 25. Is not the service more valuable to the shipper the greater the length of the haul? In other words will not a haul of 100 miles give a shipper a more extended market for his goods or produce than a haul of fifty miles?

A. Other things being equal it would.

Q. 26. Do you know whether or not the bulk of the traffic from New York to Nashville is hauled by the route through Chattanooga or by other routes?

A. I do not know, but my impression is that the large proportion of it moves through Chattanooga.

You asked me in a previous question if I considered that the rates to Nashville were unreasonably low, and I replied——

Q. 27. From the standpoint of the cost and value of the service.

A. I would like to say, I had in my mind at the time I answered the question, the comparison just between the 114 scale and the 91 scale, but to the extent that the 91 scale is based upon the higher classification, I would like to qualify it to that extent, that some of the rates would seem to be unreasonably low and some would be fair, about.

Q. 28. I spoke of the rates on the six numbered classes. Those you say, are unreasonably low?

A. I should like to qualify that by saying that where they are measured by the Southern States Freight Association classification, they would be unreasonably low.

Q. 29. The rates to Nashville?

A. Yes, sir.

Redirect examination.

By Mr. BAXTER:

Q. 1. Is it not true that the steamships operating from Boston and New York respectively to southeastern ports such as Charleston, Savannah and Brunswick, charge the same rates?

A. Yes, sir; within my knowledge, that is true. As between Boston and New York, and those points they charge the same rates. That is true as within my knowledge.

Q. 2. How much further is Boston by water than New York from Savannah?

181 A. I can only give you a guess. There is an angle there, you know. Now, merely as a guess, I might say, 200 miles running distance. What the prorating difference is, in the actual rate construction, I have no means of knowing, but it would be relatively less than the actual distance.

Q. 3. Then the steamship sailing from Boston to Savannah carries traffic two hundred miles further than steamships sailing from New York to Savannah, and you charge the same rate?

A. Yes, sir.

Q. 4. Then steamship rates are not regulated according to distance in all cases?

A. Rarely so, I think, sir.

Q. 5. Why is it that distance cannot be allowed to control in the making of rates?

A. I cannot better answer than by saying it is the circumstance of competition.

Q. 6. In other words, if the Boston steamships were to allow the New York steamships to carry the traffic to Charleston or Savannah at less rates, the traffic would move from New York instead of from Boston and the Boston steamships would get no business, is not that it?

A. That is the theory, exactly.

Q. 7. The Boston steamships, therefore, ignore the distance of two hundred miles, and ignore the additional cost of hauling it that distance, because competition forces them to do it?

A. I think I shall have to ask you to substitute "Boston line," because I cannot tell how the partners in the haul from Boston to the ultimate destination would stand. It is true of the operation as a whole. But that may be made up to the steamer in her division of the rate. But it is true they all take less because they have to.

Q. 8. Does a steamship company keep its accounts so as to show its operating expenses every year as a railroad company does?

A. I think, as a rule, steamship companies do not. Our company does. My reason for saying that, is, I think that most companies deal with their steamers as an entity. Their accounts are formulated, made up, each steamer with itself. With us, we do not. We just count a steamer the same as a railroad does a car and treat it as a whole, the ownership being strictly as a whole.

Q. 9. Your company then can tell what the operating expenses are for an entire year?

A. Yes, sir; but I would like to say here, we might call

182 operating expenses certain items which the railroads would not. We make a pretty simple division in our accounts what is expense and what is not.

Q. 10. Do you keep your accounts in such a way that you can

tell the cost to the Old Dominion Steamship Company to carry a barrel of cucumbers from Norfolk to New York?

A. No, sir.

Q. 11. Can you tell what it costs you to carry the entire vegetable traffic from Norfolk to New York as contradistinguished from other traffic?

A. No, sir.

Q. 12. Can you tell the difference between what it cost you to do the freight traffic from Norfolk to New York as contradistinguished from the freight traffic from New York to Norfolk?

A. No, sir; our accounts are not as refined as that; they are in the mass.

Q. 13. In making rates, then, upon particular articles or even upon particular classes, not knowing the cost of moving any particular article or any particular class of articles, you do not fix your rates in proportion to the cost?

A. No, sir; I cannot say that we do. We look to the return on the business as a whole and the expense upon the business as a whole to indicate the margin of safety or the reverse.

Q. 14. You have a general idea if a man offers you a cargo of vegetables here at Norfolk to carry to New York as to whether you can afford to take it at the terms he proposes?

A. Yes, sir.

Q. 15. And you accept it or decline it as you think you can or cannot make money?

A. Yes, sir.

Q. 16. Are you able to tell him or yourself as to whether the terms proposed are so many cents above or so many cents below the cost of doing the service?

A. We know with reasonable accuracy that if the entire vegetable business or the entire volume of business offering at a certain time, or at all times, were to be taken at such a figure, that it would be unremunerative, that there would be a loss, or conversely, that there would be a reasonable profit in it.

Recross-examination.

By Mr. SHAVER:

Q. 1. Steamship lines, both from Boston and New York to the South Atlantic ports, as a general rule, charge a higher rate the greater the distance, do they not?

183 A. I do not think I quite apprehend.

Q. 2. As a general rule does not your steamship line and the line from Boston to South Atlantic ports increase their rate as the distance increases?

A. Yes, sir; if you will allow me to qualify that. If the rates were on a normal basis, the distance carried would be a factor, but that, of course, is modified by the circumstances of competition.

Mr. SHAVER: That is all.

Redirect examination.

By Mr. BAXTER:

Q. 1. Do you know, or can you set forth any other matter or thing, which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If you — set forth the *sum* fully, and at large, in your answer.

A. No, sir.

FORT MONROE, VA., *June* 23, 1897.

T. S. DAVANT, a witness, on behalf of the defendants, having been duly sworn, testified as follows:

By Mr. BAXTER:

Q. 1. State your name, age, residence and occupation.

A. T. S. Davant; 47 years; Roanoke, Virginia; general freight agent, Norfolk & Western Railroad Company.

Q. 2. How long have you been connected with the railroad freight traffic departments in this country?

A. I entered the railroad service in 1865. I have been in charge of the traffic department of various roads since 1874.

Q. 3. It appears from the report and opinions of the commission in this case that the rates from New York and Boston to Nashville in December, 1892, were as follows:

Class	1	2	3	4	5	6
	.91	.78	.60	.42	.36	.31

What were the proportions received by the Norfolk & Western railroad on each of the classes of freight shipped from New York and Boston, via Hagerstown or Norfolk, destined to Nashville?

184 A. The proportions received by the Norfolk & Western railroad on each of the classes of freight shipped from New York and Boston destined to Nashville were as follows:

From New York via Norfolk:

Class	1	2	3	4	5	6
Cents per 100 lbs.	34	29.3	22.1	14.9	12.8	11.1

From Boston to Norfolk:

Class	1	2	3	4	5	6
Cts. per 100 lbs.	30.8	26.7	20.4	14.1	12.2	10.2

Q. 4. What did those proportions amount to per ton per mile on each of the classes?

A. These proportions amounted to per ton per mile on each of the classes:

Class	1	2	3	4	5	6
From N. Y., of a cent	1.67	1.44	1.08	.73	.63	.54
From Boston, of a cent	1.51	1.31	1.00	.70	.60	.50

Q. 5. What number of tons of each of said classes of freight shipped from New York and Boston via Hagerstown or Norfolk destined to Nashville were carried one mile by said road during the year 1892?

A. The number of tons of each of said classes of freight shipped from New York and Boston destined to Nashville carried one mile by said road during the year 1892 were:

From New York via Norfolk:

Class.....	1	2	3	4	5	6	Special commodities.
	687	192.5	528	716	195	1,203	1,217 tons.

From Boston:

Class.....	1	2	3	4	5	6	Special commodities.
	2,617	32.5	194	118	57	1,866	863 tons.

Q. 7. What amount of revenue was derived from said roads for the carriage of freight shipped from New York and Boston via Hagerstown or Norfolk destined to Nashville in 1892?

185 A. The amount of revenue derived by the Norfolk & Western road for the carriage of freight shipped from New York and Boston to Nashville during 1892 was:

From New York.....	$18,638 17
From Boston.....	17,575 01
A total of.....	$36,213 18

Q. 8. What was the estimated average cost per ton per mile for transporting all kinds of freight on the Norfolk & Western railroad in 1892?

A. The estimated cost per ton per mile for transporting all kinds of freight on the Norfolk & Western railroad in 1892, was .0537 cents or five and thirty-seven one-hundredths mills.

Q. 9. Did the proportion which said road received on the different classes of freight shipped from New York and Boston via Hagerstown and Norfolk destined to Nashville during 1892 exceed the estimated average cost per ton per mile on said road in 1892?

A. The average proportions which the Norfolk & Western railroad received on the different classes of freight shipped from New York and Boston destined to Nashville during 1892 exceeded the average cost per ton per mile on said road during 1892.

Q. 10. Did the proportions which said road received on the different classes of freight shipped from New York and Boston via Hagerstown and Norfolk destined to Nashville — 1892 exceed the additional cost to said road of the movement freight?

A. The proportions which the Norfolk & Western railroad received on the different classes of freight shipped from New York and Boston destined to Nashville in 1892 exceeded the additional cost to said road of the movement of the said freight.

Q. 11. What were the proportions received by said road on each

of the classes of freight shipped from New York and Boston via Hagerstown or Norfolk destined to Chattanooga?

A. The proportions received by the Norfolk & Western railroad on each of the classes of freight shipped from New York and Boston destined to Chattanooga, were:

Class	1	2	3	4	5	6
From New York	51.9	44.9	39.3	33.3	27.2	23.2
From Boston	45.5	39.5	34.7	29.6	24.5	20.2

186 Q. 12. What did those proportions amount to per ton per mile on each of the classes?

A. These proportions amounted to per ton per mile in cents on each of the classes:

Class	1	2	3	4	5	6
From New York	2.54	2.20	1.93	1.63	1.33	1.09 cent.
From Boston	2.23	1.93	1.70	1.45	1.20	.99 cent.

Q. 13. What number of tons of each of the said classes of freight shipped from New York and Boston via Hagerstown and Norfolk destined to Chattanooga were carried one mile by said road in 1892?

A. The number of tons of each of the said classes of freight shipped from New York and Boston destined to Chattanooga and carried one mile by the Norfolk & Western railroad in 1892 were:

Class	1	2	3	4	5	6	Special commodities.
From New York	502	209	186	137	211	288	237
From Boston	152	38	14	12	17	33	73.5

Q. 14. What amount of revenue was derived by said road in the carriage of freight shipped from New York and Boston via Hagerstown or Norfolk destined to Chattanooga in 1892?

A. The amount of revenue derived by the Norfolk & Western railroad by the carriage of freight shipped from Boston and New York to Chattanooga in 1892 was:

From New York	$16,835 57
From Boston	2,165 13
A total of	$19,000 70

Q. 15. What amount of revenue would have been received by said road in the carriage of freight shipped from New York and Boston via Hagerstown and Norfolk destined to Chattanooga in 1892, if said road had been compelled to accept the same rates as it is compelled to accept on freight shipped from New York and Boston via Hagerstown and Norfolk destined to Nashville?

A. The amount of revenue that would have been received by the Norfolk & Western railroad from the carriage of freight shipped from New York and Boston destined to Chattanooga in 1892, if

said road had been compelled to accept the same proportions
187 as it was compelled to accept on freight from New York and Boston destined to Nashville, is as follows:

From New York	$14,656 19
From Boston	1,756 26
A total of	$16,412 45

Q. 16. Said report and opinion shows that the rates from New York and Boston to Chattanooga were as follows:

Class	1	2	3	4	5	6
	114	98	86	73	60	49 cents.

State whether in your opinion said rates from New York and Boston to Chattanooga were just and reasonable or unjust and unreasonable and give your reasons for any opinion you may express?

A. The rates from New York and Boston to Chattanooga were in 1892 and are now—

Class	1	2	3	4	5	6
	114	98	86	73	60	49 cents.

I believe these rates were and are just and reasonable in themselves. They have been in effect for a long time and are the outgrowth of years of experience and careful adjustment. I have been intimately acquainted with the conditions surrounding the transportation of freight from the East to Chattanooga for 12 years and during all that time have never heard the reasonableness of the rates themselves questioned by any shipper.

Cross-examination:

Q. 1. On a haul from New York and Boston through Chattanooga to Nashville the rates are as follows, are they not, to wit:

Class	1	2	3	4	5	6
	91	78	60	42	36	31 cents.

A. Those are the rates from New York and Boston to Nashville via Chattanooga.

Q. 2. You also stated the rates to Chattanooga from New York and Boston to be—

Class	1	2	3	4	5	6
	114	98	86	73	60	49 cents.

did you not?

188 A. Yes, sir.

Q. 3. Is not the haul from New York and Boston via Chattanooga to Nashville 151 miles longer than the haul to Chattanooga?

A. Yes, sir.

Q. 4. You state that these rates to Chattanooga are just and rea-

sonable in themselves. Are the rates to Nashville named above also just and reasonable in themselves?

A. In my opinion the rates from New York and Boston to Nashville are unreasonably low.

Q. 5. How do you determine whether a given rate is reasonable or unreasonable?

A. The reasonableness of a rate is rather difficult thing to define. Of course we are supposed to be experienced in the making of rates, and we have to take into account a great many different things.

Q. 6. Is not the expense of service an element to be considered?

A. Necessarily.

Q. 7. Does not the cost or the expense of the service of transportation depend largely or to some extent on the length of the haul, other things being equal?

A. Yes, sir.

Q. 8. Name the rail lines which reach Chattanooga?

A. You mean the railroads which center at Chattanooga?

Q. 9. Yes, or pass through.

A. Well, the Southern railway; the Cincinnati, New Orleans and Texas Pacific railway; the Nashville, Chattanooga & St. Louis railway; the Memphis and Charleston railroad; the Alabama Great Southern railroad; the Chattanooga Southern railroad; the Chattanooga, Rome & Carrollton railway, and the Western & Atlantic railroad.

Q. 10. Name the roads which reach Nashville?

A. The Louisville and Nashville railroad and the Nashville, Chattanooga and St. Louis railway.

Q. 11. Were not the rates by all lines from northeastern cities to Chattanooga and Nashville made by agreement between the carrier parties to those rates as members of the Southern Railway & Steamship Association?

A. No, sir.

Q. 12. Are not the same rates charged by all the lines from northeastern cities to Nashville?

A. The rates from the East, from all eastern cities to Chattanooga and Nashville, which enter the cities of Chattanooga and
189 Nashville over the roads which I have named above are the same.

Q. 13. Are those rates not maintained by agreement between those roads, either express or tacit?

A. It is understood in a general way that those rates are maintained by all the roads that I have named.

Q. 14. Are not Nashville and Chattanooga in what was known as the territory subject to the jurisdiction of the Southern Railway & Steamship Association?

A. Chattanooga is but Nashville is not.

Q. 15. How long have you been engaged in the railroad business in the territory east of the Mississippi and south of the Ohio and Potomac rivers?

A. 32 years.

Q. 16. That territory east of the Mississippi and south of the Ohio

and Potomac rivers was what was known as the territory subject to the jurisdiction of the Southern Railway & Steamship Association, was it not?

A. For part of that time, yes. But that has not been continuously the case.

Q. 17. Has the greater charge for the shorter than the longer haul over the same line in the same direction, the shorter haul being included in the longer, ever, to your personal knowledge, been made in that territory before or since the enactment of the act to regulate commerce in 1887, except in the case of competition in transportation to the longer-distance point?

A. As a rule, competition is the controlling factor where higher rates are charged for the shorter than for the longer distances, but there are other conditions which also control in the matter.

Q. 18. In connection with competition?

A. Yes, sir.

Q. 19. Competition is invariably present in such cases?

A. Yes, sir.

Q. 20. That was before and since the passage of the act to regulate commerce?

A. Yes, sir; the same conditions exist.

Redirect examination.

By Mr. BAXTER:

Q. 1. Are not the rates from New York to Nashville made by the trunk lines to Cincinnati and thence by the Louisville & Nashville railroad to Nashville?

A. Yes, sir.

Q. 2. Do you regard the trunk-line rates from New York to Cincinnati as unreasonably low?

A. No, sir.

190 Q. 3. Are not the proportions which the Louisville & Nashville railroad receive from Cincinnati to Nashville on freight from New York the same per ton per mile as the trunk-line rates from New York to Cincinnati?

A. I cannot answer that question definitely, but it is my opinion that they are about on that basis.

Q. 4. Then if the trunk-line rates per ton per mile from New York to Cincinnati are not unreasonably low, do you think that the Louisville & Nashville proportions from Cincinnati to Nashville are unreasonably low?

A. No, sir.

Q. 5. Then if the rates from New York to Nashville are the sum off the trunk-line rates from New York to Cincinnati plus the Louisville & Nashville proportion from Cincinnati to Nashville, and the trunk-lines rates are not unreasonably low and the Louisville & Nashville proportions from Cincinnati to Nashville are not unreasonably low, how do you make the total rate from New York to Nashville unreasonably low?

A. If it were not for the combination of rates as you have referred

to via Louisville, the rates through Chattanooga to Nashville would be higher than they are at this time. In other words, if it were not for the controlling force of the combination of rates via Louisville, the rates to Nashville would be nearly or probably as high or higher than the present rates to Chattanooga.

Q. 6. Then the lines transporting freight from New York via Chattanooga to Nashville are forced to meet the rate which is made by the trunk lines from New York to Cincinnati and thence by the Louisville & Nashville or go out of business.

A. That is a fact, sir.

Q. 7. Please tell me what were the total number of tons moved one mile by the Norfolk & Western railroad in 1892?

A. 1,444,835,620 tons.

Recross-examination.

By Mr. SHAVER:

Q. 1. Can you state what proportion of the traffic from New York and other northeastern cities to Nashville goes by the route through Chattanooga?

A. No, sir; I cannot answer that.

Q. 2. Does not the bulk of such traffic go through Chattanooga to Nashville?

A. From eastern cities proper, that is to say, Baltimore,
191 Philadelphia, New York and Boston, the greater proportion of the business, in my opinion, moves via Chattanooga.

Mr. SHAVER: That is all.

Redirect examination.

By Mr. BAXTER:

Q. 1. Do you know of, can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. No, sir.

J. M. CULP, a witness on behalf of the defendants, having been duly sworn, testified as follows:

By Mr. BAXTER:

Q. 1. State your name, age, residence and occupation.

A. J. M. Culp; 48 years of age; Washington, D. C.; traffic manager Southern Railway Company.

Q. 2. How long have you been connected with the freight traffic of the United States?

A. Upwards of 26 years.

Q. 3. The report and opinion of the commission in this case states

that the rates from New York and Boston to Nashville at the date of said complaint, namely, December 30, 1892, were as follows:

Class	1	2	3	4	5	6	
	91	78	60	42	36	31	cents.

State what were the proportions received by the old East Tennessee, Virginia & Georgia Railway Company on each of the classes of freight shipped from New York and Boston via Bristol destined to Nashville.

A. The proportions received by the East Tennessee, Virginia and Georgia railway from Bristol to Chattanooga on the classes of freight named shipped from New York and Boston via Bristol to Nashville were as follows:

Class	1	2	3	4	5	6
From New York, cts. p'r 100 lbs..	19.9	16.7	12.9	8.7	7.4	6.5
From Boston, cts. p'r 100 lbs.....	18	15.6	11.9	8.2	7.2	6.3

192 Q. 4. What did those proportions amount to per ton per mile on each of the said classes?

—.

Class	1	2	3	4	5	6
From New York, p'r ton per mile..	1.64	1.36	1.08	.72	.61	.54
—, p'r ton per mile	1.40	1.29	.98	.69	.60	.52

Q. 5. What number of tons of each of said classes of freight shipped from New York and Boston via Bristol destined to Nashville were carried one mile by said road during the year 1892?

A.—

Class.	From New York.	From Boston.
1.....	168,674 tons.	633,556 tons.
2.....	70,906 "	7,986 "
3.....	127,766 "	47,190 "
4.....	179,564 "	28,556 "
5.....	35,332 "	16,214 "
6.....	297,418 "	357,434 "

Q. 6. What amount of revenue was derived by said road from the carriage of freight shipped from New York and Boston via Bristol destined to Nashville in 1892?

A. $21,622 [illegible]6.

Q. 7. What was the estimated average cost per ton per mile of transporting all kinds of freight over the East Tennessee, Virginia & Georgia Railway Company in 1892?

A. I am unable to state the estimated average cost per ton per mile over the different portions of the line, but the general average over the whole system from April 1st, 1891, to June 24, 1892, inclusive, was seventy-one one-hundredths (.71) of a cent per ton per mile.

Q. 8. Did the proportions which said road received on the differ-

ent classes of freight shipped from New York and Boston via Bristol destined to Nashville during 1892 exceed the estimated average cost per ton per mile on that portion of said road in 1892?

A. It did.

Q. 9. Did the proportions which said road received on the different classes of freight shipped from New York and Boston via Bristol destined to Nashville in 1892 exceed the additional cost to said road of the movement of the said freight?

A. There could be no doubt that it exceeded the average cost. The business was moved in through cars, handled in solid trains and unquestionably it exceeded the additional cost.

193 Q. 10. Said report and opinion shows that the rates from New York and Boston to Chattanooga were as follows:

Class	1	2	3	4	5	6
	114	98	86	73	60	49 cents.

What were the proportions received by said road on each of the classes of freight shipped from New York and Boston via Bristol destined to Chattanooga?

A. The proportions received by said road from Bristol to Chattanooga on each of the classes of freight shipped from New York and Boston via Bristol destined to Chattanooga were as follows:

Class	1	2	3	4	5	6
When from New York, cents per 100 lbs	30.9	26.7	23.4	19.8	16.2	13.2
When from Boston, cents per 100 lbs	27.	13.5	20.7	17.6	14.5	12.

Q. 11. What did those proportions amount to per ton per mile on each of the classes?

Class	1	2	3	4	5	6
When from New York, cts. per ton per mile	2.55	2.21	1.93	1.64	1.34	1.09
When from Boston, cts. per ton per mile	2.23	1.94	1.71	1.45	1.20	.99

Q. 12. What number of tons of each of said classes of freight shipped from New York and Boston via Bristol destined to Chattanooga were carried one mile by said road in 1892?

A.—

Class.	From New York.	From Boston.
1	121,242 tons.	36,542 tons.
2	50,336 "	9,680 "
3	47,674 "	3,388 "
4	33,154 "	2,904 "
5	52,514 "	4,114 "
6	72,116 "	8,228 "

Q. 13. What amount of revenue was derived by said road from the carriage of freight shipped from New York and Boston via Bristol destined to Chattanooga in 1892?

A. $11,276.56.

Q. 14. What amount of revenue would have been received by said road from the carriage of freight shipped from New
194 York and Boston via Bristol destined to Chattanooga in 1892 if said road had been compelled to accept the same proportions as it was compelled to accept on freight shipped from New York and Boston via Bristol destined to Nashville?

A. The revenue would have been $8,585.25.

Q. 15. What was the financial conditions of the East Tennessee, Virginia and Georgia railroad in 1892?

A. The annual report of the East Tennessee, Virginia and Georgia railway for the fiscal year from July 1st, 1891, to June 24th, 1892, inclusive, shows that there was an actual loss in operating the property so far as the freight traffic was concerned.

The total freight earnings were	$4,283,618 30
The proportion of the expenses assignable to freight traffic was	3,419,638 64
Leaving as net freight earnings	863,981 46
The amount of interest allotted to freight traffic was.	1,396,819 43
Thus leaving a deficit from freight operations amounting to	532,837 97

It is evident from this that with this loss of over half a million dollars, they could not have conceded a further reduction, a further reduction in rates would have added to the loss.

Q. 16. State what were the total number of tons of freight carried one mile by the East Tennessee, Virginia and Georgia railroad during the year 1892?

A. For the period from July 1st, 1891, to June 24, 1892, over the East Tennessee, Virginia and Georgia railroad all divisions except the Knoxville & Ohio, the number of tons hauled one mile was 482,171,704.

Q. 17. State whether or not in your opinion the above-mentioned rates from New York and Boston to Chattanooga were just or unjust, reasonable or unreasonable and give your reasons for any opinion you may express.

A. They were in my opinion certainly not unreasonably high. They were reasonably low. My reasons for this opinion are that the property moved freely on these rates; business was done and had been done under these rates at a profit; they were lower than the property could be shipped between the same points by any other means of transportation; and they were in line with the rates to Knoxville, Rome, Atlanta and Dalton and other points doing business in competition with this point.

Q. 18. Please name the carriers composing the various lines all rail or all water or part rail and part water that actually
195 and actively competed for traffic in 1892 between New York, Boston, etc., on the one side and Nashville on the other.

A. All rail from Boston to Nashville.

Star Union line via New York & New England railroad, Pennsylvania system and Louisville & Nashville railroad.

Erie Dispatch, via New York, New Haven and Hartford railroad, New York, Lake Erie & Western railway, New York, Pennsylvania & Ohio railroad, Louisville & Nashville railroad.

Great Eastern Dispatch via Boston & Maine railroad, Grand Trunk railway, Cincinnati, Hamilton & Dayton railway, Louisville & Nashville railroad.

Red line via Boston & Albany railroad, New York Central & Hudson River railroad, Lake Shore & Michigan Southern railway, Cleveland, Cincinnati, Chicago & St. Louis*ville* railway, Louisville & Nashville railroad.

White line via Boston & Albany railway, New York Central & Hudson River railroad, Lake Shore & Michigan Southern railway, Cleveland, Cincinnati, Chicago & St. Louis railway and the Louisville & Nashville railroad.

The Reading Dispatch, via the New York, New Haven & Hartford railway, Grand Trunk railway, Cincinnati, Jackson & Mackinaw railway, Louisville & Nashville railroad.

Lackawanna line via the Fitchburg railroad, the Delaware, Lackawanna & Western railroad, the New York, Chicago & St. Louis railway, the Cincinnati, Hamilton & Dayton railway, the Louisville & Nashville railroad.

Canada Southern line via Fitchburg railroad, West Shore railroad, Michigan Central railroad, Cincinnati, Hamilton & Dayton railway, Louisville & Nashville railroad.

Nickel Plate line via Fitchburg railroad, New York Central & Hudson River railroad, New York, Chicago & St. Louis railway, Cincinnati, Jackson & Mackinaw railroad, Louisville & Nashville railroad.

Blue line via New York, New Haven & Hartford railroad, New York Central & Hudson River railroad, Michigan Central railway, Cleveland, Cincinnati, Chicago & St. Louis railway, Louisville & Nashville railroad.

Interstate Dispatch, via New York, New Haven & Hartford railroad, Delaware & Hudson River Canal railroad, Cleveland, Cincinnati, Chicago & St. Louis railway, Louisville & Nashville railroad.

196 Richmond & Danville Dispatch via New York, New Haven & Hartford railroad, Pennsylvania railroad, Richmond & Danville railroad, Nashville, Chattanooga & St. Louis railway.

Atlantic Coast Dispatch via New York, New Haven & Hartford railroad, Pennsylvania railroad, Richmond & Hartford railroad, Pennsylvania railroad, Richmond, Fredericksburg & Potomac railroad, Georgia railroad, Western & Atlantic railroad, Nashville, Chattanooga & St. Louis railway.

Seaboard Dispatch via New York, New Haven & Hartford railroad, Pennsylvania railroad, Richmond, Fredericksburg & Potomac railroad, Seaboard air line, Western & Atlantic railroad, Nashville, Chattanooga & St. Louis railway.

Great Southern Dispatch via New York, New Haven & Hartford railroad, Pennsylvania railroad, Cumberland Valley railroad, Norfolk & Western railroad, East Tennessee, Virginia & Georgia railway, Nashville, Chattanooga & St. Louis railway.

The all-rail lines from New York to Nashville were:

Star Union line, via Pennsylvania system, Louisville & Nashville system.

Erie Dispatch via New York, Lake Erie & Western railroad, New York, Pennsylvania & Ohio railroad, Louisville & Nashville railroad.

Great Eastern line via Delaware, Lackawanna & Western railroad, Lake Shore & Michigan Southern railroad, Cleveland, Cincinnati, Chicago & St. Louis railway, Louisville & Nashville railroad.

Reading Dispatch via Lehigh Valley railroad, Grand Trunk railway, Cincinnati, Hamilton & Dayton railway, Louisville & Nashville railroad.

White line via New York Central & Hudson River railroad, Lake Shore & Michigan Southern railway, Cleveland, Cincinnati, Chicago & St. Louis railway, Louisville & Nashville railroad.

Lackawanna line via Delaware, Lackawanna & Western railroad, New York, Chicago & St. Louis railroad, Cincinnati, Hamilton & Dayton railway, Louisville & Nashville railroad.

Canada Southern line via West Shore railroad, Michigan Central railroad, Cincinnati, Hamilton & Dayton, Louisville & Nashville.

Nickel Plate line, via West Shore railroad, New York, Chicago & St. Louis railway, Cleveland, Cincinnati, Chicago & St. Louis railway, Louisville & Nashville railroad.

197 Blue line via New York Central & Hudson River railroad, Lake Shore & Michigan Southern railroad, Cleveland, Cincinnati, Chicago & St. Louis railway, Louisville & Nashville railroad.

West Shore line via West Shore railroad, New York, Chicago & St. Louis railway, Cleveland, Cincinnati, Chicago & St. Louis railway, Louisville & Nashville railroad.

Interstate Dispatch via New York, Lake Erie & Western railroad, New York, Pennsylvania & Ohio railroad, Louisville & Nashville railroad.

Midland line via New York Central & Hudson River railroad, Lake Shore & Michigan Southern railroad, Cleveland, Cincinnati, Chicago & St. Louis railway, Louisville & Nashville railroad.

Rail and water from Boston, Mass., to Nashville:

Continental line, Merchants' & Miners' Transportation Company, Baltimore & Ohio railroad, Baltimore & Ohio Southwestern railroad, Louisville & Nashville railroad.

Virginia, Georgia & Tennessee air line via Merchants' & Miners' Transportation Company, Norfolk & Western railroad, East Tennessee, Virginia & Georgia railroad, Nashville, Chattanooga & St. Louis railway.

Kanawha Dispatch via Merchants' & Miners' Transportation Company, Chesapeake & Ohio railway, Louisville & Nashville railroad.

Cumberland Gap Dispatch via Merchants' & Miners' Transportation Company, Norfolk & Western railroad, Louisville & Nashville railroad.

Savannah line via Ocean Steamship Company, Central Railroad & Banking Company of Georgia, Western & Atlantic railroad, Nashville, Chattanooga & St. Louis railway.

Paint Rock line via Merchants' & Miners' Transportation Company, Richmond & Danville railroad, East Tennessee, Virginia & Georgia railroad, Nashville, Chattanooga & St. Louis railway.

Atlantic Coast line via Merchants' & Miners' Transportation Company, Atlantic Coast line, South Carolina railway, Georgia railway, Western & Atlantic railroad, Nashville, Chattanooga & St. Louis railway.

Seaboard air line via Merchants' & Miners' Transportation Company, Seaboard air line, Western & Atlantic railroad, Nashville, Chattanooga & St. Louis railway.

Rail and water from New York to Nashville are as follows:

Savannah line via Ocean Steamship Company, Central
198 Railroad & Banking Company of Georgia, Western & Atlantic railroad, Nashville, Chattanooga & St. Louis railway.

Virginia, Tennessee & Georgia air line via Old Dominion Steamship Company, Norfolk & Western railroad, East Tennessee, Virginia & Georgia railway, Nashville, Chattanooga & St. Louis railway.

Kanawha Dispatch via Old Dominion Steamship Company, Chesapeake and Ohio railway, Louisville & Nashville railroad.

Cumberland Gap Dispatch via Old Dominion Steamship Company, Norfolk & Western railroad, Louisville & Nashville railroad.

Atlantic Coast line via Old Dominion Steamship Company, Atlantic Coast line, South Carolina railway, Georgia railroad, Western & Atlantic railroad, Nashville, Chattanooga & St. Louis railway.

Piedmont air line via Old Dominion Steamship Company, Richmond & Danville railroad, East Tennessee, Virginia & Georgia railroad, Nashville, Chattanooga & St. Louis railway.

Mallory line via East Tennessee, Virginia & Georgia railway, Nashville, Chattanooga & St. Louis railway.

Clyde line via South Carolina railroad, Georgia railroad, Western & Atlantic railroad, Nashville, Chattanooga & St. Louis railway.

I have not attempted to enumerate all of the lines that compete for this business but I have the important ones.

Q. 19. There are a number of cities in Georgia and Alabama that for many years have taken the same rail and water rates from New York and Boston, etc. Please state what would be the effect upon some of those cities if the rates from New York, Boston, etc., to Chattanooga should be reduced to the same as the rates from New York, Boston, etc., to Nashville, while the rates from New York, Boston, etc., to those cities should remain the same?

A. The effect would be to divert some of the traffic from those

points to Chattanooga—some of the traffic which those points enjoy and distribute would be distributed from Chattanooga.

Cross-examination.

By Mr. SHAVER:

Q. 1. What proportion of the traffic from New York and Boston and other northeastern cities goes by the route through Chattanooga to Nashville?

A. I cannot state the figures. There is a considerable proportion of it.

Q. 2. Does not the bulk of such traffic to Nashville go through by the route through Chattanooga?

199 A. I think not. Probably the bulk of light freights such as boots and shoes and dry goods, likely does go through Chattanooga but much the largest part of the heaviest freight goes through Cincinnati or Louisville.

Q. 3. You differ from Mr. Guilladeau, vice-president and general manager of the Old Dominion Steamship Company, and Mr. Vanden Burg, traffic manager of the Louisville & Nashville Railroad Company, on that point. They stated in their examination that the bulk of the traffic from New York and other northeastern cities to Nashville went by the route through Chattanooga. Is not their information on that subject likely to be as good as yours?

A. Mr. Van den Burg represents a line into Nashville and his information ought to be reasonably good, but I still maintain that the largest part of the heaviest goods, machinery and articles of that kind which frequently or usually are shipped in car-loads, goes the other way, through Cincinnati.

Q. 4. Name the roads which actually reach or touch Nashville?

A. The Louisville & Nashville railroad and the Nashville, Chattanooga & St. Louis railway.

Q. 5. All the lines then that you have named as running from New York and Boston to Nashville are formed by combinations with those two terminal carriers, the Louisville & Nashville and the Nashville, Chattanooga & St. Louis roads, are they not?

A. So far as the rail lines terminating in Nashville are concerned, yes.

Q. 6. I refer to lines from New York and Boston to Nashville?

A. I say, so far as rail lines terminating in Nashville are concerned, they all form combinations either with the Louisville & Nashville or the Nashville, Chattanooga & St. Louis railway.

Q. 7. Are not all the lines from New York and Boston to Nashville which you name in your answer to the 18th interrogatory made by combination with either the Louisville & Nashville or the Nashville, Chattanooga & St. Louis railroad, either as initial or terminal carriers?

A. Yes, sir, as named.

Q. 8. Name the railroads which actually reach or touch Chattanooga.

A. The Southern railway, the Cincinnati, New Orleans & Texas

Pacific railway, the Nashville, Chattanooga & St. Louis railway, the Memphis & Charleston railway, the Alabama Great Southern
200 railroad, the Chattanooga Southern, the Chattanooga, Rome & Columbus railway, the Western & Atlantic, which is a part of the Nashville, Chattanooga & St. Louis railway.

Q. 10. Cannot numerous lines from New York and Boston to Chattanooga be formed by combinations with these various roads which reach or touch Chattanooga?

A. Yes, sir.

Q. 11. If you go far enough around from the direct route the number of lines that can be formed by the different combinations is almost unlimited, is it not?

A. Well, a great many can be made.

Q. 12. In your direct examination you stated that the following rates from New York and other northeastern cities to Chattanooga were just and reasonably of themselves, to wit:

Class	1	2	3	4	5	6
	114	98	86	73	60	49 cents.

As one ground upon which you base that opinion, you stated that the traffic moved freely under those rates. Would you consider rates reasonable and just until traffic ceased to move under them, until they became prohibitory, in other words?

A. It would depend very much. A rate might be made from one point of production to a point of consumption for some reason, normal or abnormal at a very low rate, a rate which would control practically all the business of that class of goods into that town. Some other point in another direction served by some other road or line of railroads might have been doing the bulk of the business into this point of consumption and all of its trade might be diverted to this point of production by reason of these reduced rates from this new point of production and yet it would not follow that the rates from this old point of production were not just and reasonable. The distance may have been much longer. So, to take an article like brick, which must take a low rate. It may be shipped to a point of consumption at what would be considered a reasonably low rate. Well, the brick commences to be made at that point, and it would probably prevent the brick being shipped at all from this point that had shipped it. Yet, it does not argue that the rate was unjust or unreasonable because the parties could not ship. The same is true of coal. Coal might be shipped to a point and yet upon the finding of coal at the point of consumption the mines which had been shipping the coal might not be able to ship at the rates which they had formerly. Yet those former routes
201 would continue to be just and reasonable. Instances might be multiplied.

Q. 13. You stated that the rates from New York and other northeastern cities on traffic hauled by the route through Chattanooga to Nashville were as follows:

Class	1	2	3	4	5	6
	91	78	60	42	36	31 cents.

Are those rates, in your opinion, just and reasonable of themselves?

A. They might be higher and still be not unreasonably high. They might be as high as the rates to Chattanooga and no doubt would be if the lines through Chattanooga, working through Chattanooga could alone fix the rates. But they meet competition round the other way—competition via the Ohio river.

Q. 14. My question excluded competition. I asked if they were unjust in and of themselves?

A. I answer that they are above the additional cost of transportation; that is to say the actual movement expense of this particular traffic, although they might be higher and still be not unreasonably high. They are just as much the lines via Chattanooga can charge.

Q. 15. Do they pay what you term operating expenses?

A. They pay more than the actual movement expense incurred in the moving of this particular traffic. That is to say, the expense incurred as between moving this traffic and not moving this traffic.

Q. 16. The haul from New York and other northeastern cities through Chattanooga to Nashville is 151 miles longer than the haul to Chattanooga, is it not?

A. It is.

Q. 17. Is a rate reasonable, in and of itself, which does not yield the carrier a proper remuneration in excess of the cost of transportation?

A. In my opinion a road is always justified in taking additional traffic or traffic which it otherwise could not get, to the extent of making a rate as low as the actual movement, expense incurred in the movement of that traffic.

Q. 18. Can it be ascertained whether a rate is reasonably remunerative to the carrier without first considering the cost and the expense of the service of carriage?

A. It is very difficult to obtain the actual cost of carriage. Railroads arrive at that result just as nearly as they can, and then they endeavor in making rates to fix that average cost or that estimated cost of carriage as a minimum below which they will not go.

202 Now there may be average cost or estimated cost including fixed charges; there is the cost which leaves out the fixed charges and takes all other kinds of expense; then there is a cost which pertains simply to the movement of a particular business; a cost which is incurred only because that particular business is moved.

Q. 19. Is not the expense or the cost of the service of carriage an element to be considered in determining the reasonableness or the unreasonableness of a given rate or set of rates?

A. My experience is that the estimated cost is only used as a minimum below which the carriers will not go.

Q. 20. Does not the cost or expense of the service of transportation depend largely or to some extent on the length of the haul, other things being equal?

A. Other things being equal, the longer the haul, the greater the cost.

Q. 21. Other things being equal, is not the consumption of time greater, the greater the length of the haul?

A. Other things being equal, yes. A great deal, however, is covered by that term "other things being equal."

Q. 22. Is not the consumption of fuel greater, the greater the length of the haul, other things being equal?

A. Other things being equal, yes.

Q. 23. Is not the wear and tear on locomotives, cars, tracks, road, etc., greater, the greater the length of the haul, other things being equal?

A. Yes, sir.

Q. 24. Is not the cost of keeping the road in repair or in good condition greater, the greater the length of the haul, other things being equal?

A. Yes, sir.

Q. 25. Other things being equal, does it not require more locomotives and cars and more crews for running trains on a long road than on a short road?

A. Other things being equal, yes sir.

Q. 26. Other things being equal, does not distance add to the cost of building a road, and are not therefore the fixed charges such as interest on the capital invested, greater, the greater the length of the road?

A. Other things being equal, yes, sir.

Q. 27. Other things being equal, is not the service more valuable to the shipper, the greater the length of the haul? In other words, will not a haul of 100 miles give a shipper more extended markets for his goods or produce than a haul of 50 miles?

A. Not necessarily. The haul to the shipper or consignee
203 where he is at a point 100 miles distant from the point of shipment may not be worth as much as the haul to the consignee remote only 50 miles from the same point of shipment.

Q. 28. You stated that traffic was hauled from New York and Boston through Chattanooga to Nashville in car-loads and under through bills of lading. Is not this the case also as to traffic from those cities to Chattanooga?

A. It is.

Q. 29. Are not the rates by all the lines from New York and Boston to Nashville both through Chattanooga and by the other routes the same?

A. Generally the rates are the same.

Q. 30. Are not those rates maintained by agreement between those lines?

A. In past years there have been fierce contests over the rates to Nashville. They have been reduced far below what they are now. The result of those several contests and of the competition direct and competition indirect—by indirect competition I mean expression of view in meeting and in conference as to what rates should be—the fighting it out, as it were, by argument—have resulted in those

rates, and while they may be rates understood and agreed to by all the lines, they are nevertheless the result of fierce, active, controlling competition covering a period of many years. Business has been in the past shipped to Nashville from the East by the Cumberland river from Ohio River points.

Q. 31. It was in order to do away with this fierce competition of which you speak that the roads finally adopted these rates, was it not?

A. These were just about as high as the rates could be made and maintained in view of the competition, not only rail but particularly by the Ohio River and the Cumberland River boats.

Q. 32. Do you know how long since through transportation from New York and Boston to Cincinnati and thence via the Ohio and Cumberland rivers to Nashville has existed?

A. I cannot recall now. But it was a few years prior to 1891. My acquaintance about the competition via the Cumberland river into Nashville has not been so intimate since September 1st, 1891, as it was prior to that time.

Q. 33. Are not the rates by all the lines from New York and Boston to Chattanooga the same?

A. The rates by all the lines are the same; and the rates by the rail and water lines are the same except the Mallory line from New York to Brunswick and thence to Chattanooga.

204 Q. 34. Were not those rates now in force on the six classes to Chattanooga and which you have named, established by agreement between the carriers, members of the lines, parties to those rates?

A. They are; but they are likewise the result of competition. They are also due to competition. The competition has not been found in the past so active, so disturbing of rates, or rather so reductive of rates as to necessitate fixing the rates to Chattanooga at the point at which it was found necessary to fix them at Nashville by the lines through Chattanooga.

Q. 35. Is not Chattanooga one of the points in what was known as the territory subject to the jurisdiction of the Southern Railway & Steamship Association?

A. It is in the territory of what was known as the territory of the Southern Railway & Steamship Association, and Nashville was at one time in that territory also.

Q. 36. Did not that association fix the rates to all competitive points within that territory, such as Nashville, Chattanooga, Atlanta, Rome, etc.?

A. The Southern Railway & Steamship Association—through the machinery of the Southern Railway & Steamship Association the rates were published; but the rates were fixed by the lines themselves, members of the association. There was competition regulated somewhat by the machinery of the association, perhaps, but nevertheless competition. Sometimes direct, active and by this competition in conference and in convention that I have referred to. The rates to Chattanooga have not always been as high as they are now. Frequently competition has forced them lower than

they are now. But in the main competition has not been found so active and effective as to reduce them below the figures they are now.

Q. 37. Each carrier, a member of that association had a voice in fixing the rates, did it not?

A. Yes, sir; there was also in the event of a disagreement at one time and until less than three years ago, a plan of arbitration where the parties could not agree.

Q. 38. Each carrier, a member of that association, was bound to abide by the rates agreed upon, was it not, by the rules of the association?

A. Under the old agreements, yes. But they could withdraw from that agreement upon reasonable or agreed notice.

Q. 39. What organization has succeeded the Southern Railway & Steamship Association?

205 A. The immediate successor was the Southern States Freight Association. The second successor, and the one at present in existence, is the Southeastern Freight Association.

Q. 40. About when did the Southern States Freight Association come into existence?

A. On or about October 21st, 1895, the Southern States Freight Association came into existence. The Southeastern Freight Association on or about May 1st, 1897.

Q. 41. How long have you been engaged in the railroad business in the territory east of the Mississippi and south of the Ohio and Potomac rivers?

A. More than 26 years.

Q. 42. Has the greater charge for the shorter than the longer haul over the same line in the same direction, the shorter being included in the longer, ever to your personal knowledge, been made in that territory before or since the enactment of the act to regulate commerce in 1887, except in cases of competition in transportation to the longer-distance point?

A. Not that I recall. No line willingly and of its own volition arbitrarily reduces the rates to a further point to a less figure than an intermediate point. It is the result of competition where it does make the rate less for the longer than for the shorter distance in the same direction over the same line.

Redirect examination.

By Mr. BAXTER:

Q. 1. Can the number of tons carried one mile or the number of tons carried of freight-earning revenue or the average receipts per ton per mile or the average cost of carrying one ton per mile either jointly or separately be used as the standard for railroad rate-making?

A. It cannot and is not.

Q. 2. State whether competition between carriers, whether by

rail or by water substantially affects the circumstances and conditions under which the transportation of freight is conducted.

A. It does. Not only does it affect the rate itself, but it likewise affects the circumstances and conditions under which the property may be carried. Competition will require a road to run trains at a higher rate of speed; it will require it frequently to carry cars loaded to a less weight per car; it will require it sometimes to take a part of a car-load without waiting to fill up the car; it will require frequently the road to pay a claim, the payment of which the railroad company might successfully resist, in order to get business; and therefore it does very materially affect the circumstances and
206 conditions under which the property is transported, in addition to the rate of freight which it affects.

Q. 3. Something has been said in the cross-examination in regard to the value of the service. May there not be a difference between the value of the service to the shipper and the value of the service to the carrier?

A. Precisely. The value of the service to the shipper or consignee for the transportation of 100 lbs. of stuff may be only 25 cents per hundred pounds. The value of that service may be to the carrier greater for at least two reasons: one that it will cost it more to perform the service than the 25 cents; another reason, that it may be employing all of its motive power and rolling stock in the transportation of property which yields it for an equivalent service much more net money than 25 cents would for the first service referred to.

Q. 4. If the shipper living at Memphis where cotton is worth in the market, say 10 cents, ships that cotton to Holly Springs, where it is worth in the market only 9 cents a pound, would not the value of the service to him be less than nothing?

A. It would; one cent per pound less than nothing.

Q. 5. If, on the other hand, he shipped it from Holly Springs, where it was worth 9 cents per pound, to Memphis, where it was worth 10 cents per pound, the value of the service to him would be one cent, would it not?

A. Yes, sir; one cent per pound; and in either case the value of the service to the railroad company might be the same.

Recross-examination.

By Mr. SHAVER:

Q. 1. Are not the rates now in force to Nashville and Chattanooga the same as the rates in force when the Southern Railway & Steamship Association was in existence? Has there been any material change in the rate or any change in the rates since that association ceased to exist?

A. No material changes.

Q. 2. You stated in substance in your direct examination that the average receipts per ton per mile and estimated cost of carrying one ton one mile on traffic in general did not furnish a standard by

which you could determine what was reasonable rate in a given case, I believe?

A. Yes, sir.

Q. 3. Is not such data useful to some extent in determining whether an existing rate is or is not excessive?

207 A. It is useful in determining whether all the rates are excessive. In other words, the average receipts of a road per ton mile might be so much that taken in connection with other things it might be held that the rates were excessive. But much the largest proportion of the tonnage of all roads is carried at rates which are fixed by competition in some form or other, either of carriers or of markets or of one product with another product which will serve the same purpose.

Q. 4. You stated in your direct examination what were the average receipts per ton per mile of your road and the estimated cost of carrying a ton a mile on traffic from New York and other northeastern cities, and you stated that the proportion which your road received of the through rates from those points to Nashville exceeded per ton per mile the estimated cost per ton per mile and the average receipts per ton per mile and from that you inferred, did you not, that the proportion of the through rates to Nashville which your road received, paid something in excess of the cost of transportation?

A. I stated the average cost per ton per mile for transporting freight over the whole system of the East Tennessee, Virginia & Georgia railroad during a portion of 1892. I did not state the cost with respect to the business from New York to Nashville alone. I stated in my direct examination that the traffic carried from New York to Nashville paid the East Tennessee, Virginia & Georgia railroad more than the expense incurred in carrying that additional traffic or stated that in substance.

Q. 5. From that you inferred, did you not, that your road's proportion of the through rate paid something in excess of the cost of transportation?

A. I did not say that. I said that the business, the traffic did pay, that is, the East Tennessee, Virginia and Georgia's proportion paid it more than the expense incurred in carrying that particular traffic. This business was carried on trains which would have to run any way, and there are other expenses which would have been incurred whether this business was carried or not, and therefore I say, unhesitatingly, that this business paid more than the cost incurred by reason of this particular movement.

Q. 6. How long have carriers been making out this data as to average receipts per ton per mile and estimated cost of carrying one ton one mile?

A. A great many of them do not do it at all. The Southern railway today does not attempt to figure the cost per ton per

208 mile of carrying freight. The records of the East Tennessee, Virginia & Georgia railroad shows that the estimated average cost for transporting all kinds of freight on all portions of the East Tennessee, Virginia and Georgia railroad from April 1st, 1891, to

June 24th, 1892, inclusive, was seventy-one one-hundredths (.71) of a cent per ton per mile.

Q. 7. Has not this data been kept by other roads for a great many years?

A. I have no information that any road has invariably kept the cost per ton per mile for a great many years. Some roads have done it for some years, I know.

Q. 8. They have done it for their own use, have they not?

A. I assume so. It is published in their annual reports. I will say that my opinion is that it is very difficult if not impracticable to arrive at the actual cost per ton per mile of moving freight traffic over any road.

Q. 9. This data is based upon actual calculation, is it not?

A. The average receipts per ton per mile are very easily arrived at. The average cost per ton per mile, as I have testified, is estimated as to the East Tennessee, Virginia & Georgia railroad.

Q. 10. The average receipts per ton per mile are the result of accurate calculation, is it not?

A. Yes, sir.

Redirect examination.

By Mr. BAXTER:

Q. 1. Please file as Exhibit No. 3, to your deposition a copy of the agreement under which the Southeastern Freight Association now in existence was organized.

A. Yes, sir.

Mr. BAXTER: That is all.

Q. 2. Do you know or can you set forth any other matter or things which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. No, sir.

NASHVILLE, TENN., *July 14th*, 1897.

T. M. GALLAGHER, a witness on behalf of the defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. BAXTER:

Q. 1. State your name, age, residence and occupation.

209 A. T. M. Gallagher; forty years of age; reside in Nashville; I am general freight and passenger agent of the Nashville, Paducah & Cairo, and the Nashville & Evansville Packet Companies.

Q. 2. Upon what rivers do the boats of those two companies ply?

A. The Cumberland and Ohio.

Q. 3. How many boats are owned or operated by each of the companies?

A. Five boats by the two companies.

Q. 4. State the names of the boats and the actual carrying capacity of each.

A. The H. W. Buttorff, about three hundred and ninety tons, as near as I can get at it. She has a Government measurement, but in the carrying capacity we have always to estimate that by the amount of freight and the Government measurement does not give us the carrying capacity. We estimate it by the number of bags of corn they can load to. That is the way we get at the boat's carrying capacity.

The steamer W. K. Phillips, about three hundred and fifty tons; the steamer R. Dunbar, about three hundred and ninety tons; the steamer P. D. Staggs, about two hundred and fifty tons, and the steamer Bob Dudley, about three hundred and twenty-five tons.

Q. 5. Between what cities do each of said steamers ply?

A. Between Nashville and Paducah, Nashville and Evansville, and Nashville and Burnsides, Ky., in connection with the Cincinnati Southern road up there.

Q. 6. Which of these steamers ply between Nashville and Paducah?

A. The H. W. Buttorff, making two trips per week.

Q. 7. Which of these steamers ply between Nashville and Evansville?

A. The steamer W. K. Phillips—one trip a week to Evansville.

Q. 8. Which of these steamers plies between Nashville and Burnsides?

A. The steamer R. Dunbar.

Q. 9. You may state in that connection, how many trips she makes a week.

A. One trip a week to Burnsides.

Q. 10. During how many months in the year, on an average, is the Cumberland river navigable for the steamboats which ply between Nashville and Paducah, and between Nashville and Evansville?

A. Well, sir, the seasons differ. Sometimes we make full
210 eight months to eight and a half months between Nashville and Paducah; and from seven and a half to Evansville. Some seasons we run as long as nine and ten months. The weather seems to come around in cycles, and sometimes we hardly lay up the whole season.

Q. 11. On traffic shipped from New York and other eastern cities via the trunk lines to Evansville and thence to Nashville, what rates will your company accept for the transportation of such freight between Evansville and thence to Nashville, what rates will your company accept for the transportation of such freight between Evansville and Nashville?

A. Well, from six to twelve and a half cents per hundred. In bringing freight by river we never use classifications on the western waters, on the Ohio, Cumberland and the Mississippi. We take

freight by its weight and bulk. The heavy freight has considerable precedence over light freight, in giving a rate, from the fact that the tonnage on the light steamboats is limited. We cannot couple up like a railroad company, and run all the cars we want; but, for instance, we can take nails at about half what we can boots and shoes. Now, dry goods we can take at a very low rate, from the fact that they are in a good compact case, and weigh well. We make a low rate on them. Ten cents a hundred would be a magnificent rate on dry goods from Evansville to Nashville. We would bring nails at six and a half or seven cents from Evansville, and boots and shoes at twelve and a half.

Q. 12. Do I understand, then, that you would carry the various classes of freight known to the official classification, according to weight and bulk at the prices suggested above?

A. Yes, sir.

Q. 13. In this case it appears that the rates from New York to Chattanooga in 1892, were as follows:

Classes	1	2	3	4	5	6
Cents	114	98	86	73	60	49

It also appears that the rate- from New York via the trunk lines to Evansville, are as follows:

Classes	1	2	3	4	5	6
Cents	83	72	55	39	33	28

It thus appears that the difference- between the rates from New York to Chattanooga, and the rates from New York to Evansville, are as follows:

Classes	1	2	3	4	5	6
Cents	31	26	31	34	27	21

211 The above figures refer to cents per hundred pounds. State whether or not your company would be willing to carry freight from Evansville to Nashville at the above differences on classes 1, 2, 3, 4, 5 and 6?

A. Yes, sir. We would be glad to get such rates on shipments from Evansville.

Q. 14. What is the highest rate you have charged on any class of freight from Evansville to Nashville?

A. Ten cents a hundred.

Q. 15. And the lowest?

A. Six.

Q. 16. And you have accepted and carried freight at those figures?

A. Yes, sir.

Q. 17. And would be willing to do it now?

A. Would be willing to do it again and expect to do it again next season when we open up our fall trade.

Q. 18. The rates from New York to Cincinnati, are as follows:

Classes	1.	2.	3.	4.	5.	6.
Cents	65.	57.	44.	30.	26.	22.

The difference between those rates and the rates from New York to Chattanooga, are as follows:

Classes	1.	2.	3.	4.	5.	6.
Cents	49.	41.	42.	43.	34.	27.

State whether or not your company in connection with other steamboat companies operating on the Ohio river would be willing to carry freight from Cincinnati to Nashville, at the rates represented by the difference which is enumerated?

A. Yes, sir.

Q. 19. Are there any boats plying upon the Ohio river, with which your boats connect at Evansville?

A. Yes, sir; we have connected with the Memphis, New Orleans & Cincinnati Packet Co., which operates between Cincinnati and New Orleans.

Q. 20. Have you ever participated in the carriage of freight from Cincinnati to Nashville?

A. A great deal.

Q. 21. What is the highest rate you charged on any freight?

A. Thirty cents a hundred.

Q. 22. From Cincinnati to Nashville?

A. From Cincinnati to Nashville. We handle a class of
212 goods—collar pads, which are light and bulky and take a world of room, and we get thirty cents a hundred on those. Nails, we bring at twelve cents—nails and wire—twelve cents a keg, and twelve cents a hundred on the wire—barbed wire. The rates run from twelve to thirty cents a hundred. On paper pads in cases, we get twenty cents a hundred; wall paper twenty cents a hundred.

Q. 23. Dry goods, boots and shoes and groceries, at what rates are you willing to carry those from Cincinnati to Nashville?

A. Dry goods would take a lower rate than boots and shoes. Boots and shoes would be forty cents a hundred from Cincinnati. The agent at Cincinnati makes the rates this way. We prorate with him. If it is necessary to make a rate of ten cents, we take our proportion, which would be five cents. He makes whatever rates are necessary to get the shipment from the railroad at Cincinnati. Dry goods, we get, I suspect, at about twenty-five cents a hundred, that being heavy and compact, and good freight.

Q. 24. Do the steamers plying on the Ohio and Cumberland rivers publish tariffs quoting rates upon the different classes of freight like the railroads do?

A. No, sir.

Q. 25. Do they undertake to maintain such tariffs as they publish?

A. No, sir, they do not.

Q. 26. The rates from New York and Boston, via ocean to New Orleans, and thence via river to Memphis, are as follows:

Classes	1	2	3	4	5	6
Cents	65	60	45	33	28	27

The difference between these rates and the rates from New York to Chattanooga are as follows:

Classes	1	2	3	4	5	6
Cents	49	38	41	40	32	22

Please state whether your boats and the boats of other companies with which you connect would be willing to carry from Memphis to Nashville, freight at the rates shown by said differences?

A. Yes, sir, we have the same line connecting with us from there that we have to Cincinnati. They would bring it as well from Memphis as they would from Cincinnati. In fact they would be more willing to do that, from the fact that the trips are lighter upstream than they are downstream.

Q. 27. Has your line ever carried any freight from Memphis to Nashville?

213 A. No, sir; unless it was sugar or molasses coming from New Orleans via Memphis.

Q. 28. At what rate do you carry sugar and molasses from New Orleans to Nashville?

A. Eighteen cents a hundred on sugar, and one dollar a barrel on molasses.

Q. 29. Under what class would sugar fall under the official classification, do you know?

A. No, sir; I do not know; I never looked it up in the official classification. We figure the rate at twelve cents a hundred from Paducah to Nashville. That is where the stuff is reshipped on our boats.

Q. 30. Whether shipments come from Cincinnati destined to Nashville or from Memphis or New Orleans, destined to Nashville, they would be transferred to your company's boats either at Evansville or Paducah?

A. At Evansville or at Paducah. From Cincinnati going south is the boat that leaves Cincinnati Wednesday connecting with our Evansville boat, almost direct at Evansville, Saturday. Our boat leaves Nashville Wednesday, and one of theirs leaving Cincinnati Wednesday. They both meet — Evansville, and the connection is almost direct. There is another boat which leaves Cincinnati Saturday, which connects with our Paducah boat at Paducah the following Wednesday and makes good connection. The goods are about six days from Cincinnati to Nashville.

Q. 31. How long are they out from Evansville to Nashville?

A. Just about the same. It takes the Evansville boat a week to make a trip; she leaves here at noon, and gets back Tuesday morning.

Q. 32. How long does it take to bring goods from Evansville to Nashville?

A. The boat leaves there Saturday at four o'clock in the evening and gets here Tuesday morning early; that is about two and a half days or two and three-quarters.

Q. 33. What is the time by the boats from Paducah to Nashville?

A. About the same time; they leave there Wednesday noon and get here Friday morning early.

Q. 34. If rates that would be satisfactory to you, such as you have referred to above, were permanent, and freight was offered in sufficient quantities, could an adequate line of tonnage be obtained to move such freight at those rates?

A. I think so, without any doubt.

214 Cross-examination.

By Mr. SHAVER:

Q. 1. I understood you to say that you are connected officially with two lines of steamers on the Cumberland river? What are the names of those lines?

A. Yes, sir; we have two lines; the Nashville, Paducah & Cairo Packet Co., and the Nashville & Evansville Packet Co.

Q. 2. How many boats are there on each of those lines?

A. We have five lines together.

Q. 3. Both lines?

A. Yes, sir. Their earnings are put in together. Their ownership is about the same. They are not incorporated. We always designate them differently.

Q. 4. Did you say five to each lines, or five to both?

A. Five to both lines.

Q. 5. One steamer plies, I understood you to say, between Nashville and Paducah?

A. Yes, sir.

Q. 6. And makes two trips a week?

A. Two trips a week.

Q. 7. Two round trips?

A. Two round trips.

Q. 8. And one plies between Evansville and Nashville?

A. Yes, sir.

Q. 9. And makes one trip a week?

A. Yes, sir.

Q. 10. One round trip?

A. Yes, sir.

Q. 11. Those are the only two boats that ply between Nashville and Paducah, and Nashville and Evansville?

A. Yes, sir.

Q. 12. How many tons capacity did you say the boat had that plies between Nashville and Paducah?

A. Three hundred and ninety.

Q. 13. How many tons capacity does the boat have that plies between Nashville and Evansville?

A. About three-hundred and fifty.

Q. 14. You stated that the Cumberland river was sometimes navigable nine and ten months in the year?

A. Yes, sir.

Q. 15. About how often does that happen?

A. Well, it comes about every seven years, we figure it.

Q. 16. During the other years how long is it navigable?

A. We have eight months' navigation, and eight and a half months to Paducah. Business drops out in the Evansville trade, along about this time of the year. However, our boat is running now to Evansville. It left today at noon. It is running a little longer than usual.

Q. 17. During the other years, how many months is the river navigable from Nashville to Paducah?

A. It runs about eight months.

Q. 18. Then, as a general rule, it is not navigable from three and a half to four months a year?

A. No, sir, we commence, frequently, in the middle of November, or the first of December, and run up to the first of July, and possibly to the 15th of July. We always figure on eight months' navigation in the lower Cumberland.

Q. 19. If goods are transported from New York and other eastern cities to Cincinnati, and thence by the Ohio and Cumberland rivers to Nashville, would they not have to be transferred from the cars at Cincinnati to the boats on the Ohio?

A. Yes, sir; at a cost of three cents a hundred.

Q. 20. Would they not have to be again transferred from the Ohio River steamer at Evansville or Paducah to the Cumberland River steamer?

A. Yes, sir; at the cost of the last steamer, out of their proportion of the rate. We pay that on all shipments they bring to us, the tonnage. What we mean by tonnage, is that there are wharf-boats at Paducah and Evansville. In case the boats do not make a direct connection, these wharf-boats receive these shipments and take care of them until the boat to which they are to be reshipped on comes. The tonnage is charged to the boat that gets the shipment, for taking care of the goods.

Q. 21. You have stated that the rates which your steamer lines were willing to accept from Evansville to Paducah were very much lower than the rates charged by the railroads.

A. Yes, sir.

Q. 22. Are the rates which you charge from Paducah and Evansville, very much lower than the rail rates from those points to Nashville?

A. I think they are.

Q. 23. I think you said your highest rate was ten cents a hundred pounds, and your lowest, six.

A. Yes, sir. The highest we have received on any reshipping freight, coming from Evansville, brought to us by the railroads there, in connection with our boats, was ten cents a hundred, and we brought it as low as six cents a hundred.

Q. 24. How long has that been the case?

216 A. That has been the case for several years. Last year we had to handle glassware at six cents a hundred, in order to secure the shipment, and that is a very cumbersome, light freight. It paid us very poorly. However, we had to accept that rate in order to get the shipment.

Q. 25. Are there any through rates published from New York and other eastern cities via Cincinnati, and thence via the Ohio and Cumberland rivers, to Nashville?

A. Not that I know of.

Q. 26. Have you ever known of such through rates being published?

A. No, sir.

Q. 27. Have there been through shipments to any extent since the roads from Cincinnati and Evansville were completed to New York, and other eastern cities, via Cincinnati, and thence via the Ohio and Cumberland rivers to Nashville?

A. We have handled some through shipments. I cannot recall how long ago that was. But there is one shipment I remember in the last six weeks where we handled about fifteen hundred boxes of axes, manufactured in New York, on which our Pittsburg connection made a rate of twenty-one cents a hundred from Pittsburg to Nashville. I think they got that freight from the Pennsylvania Company at Pittsburg—it was some big axe concern in New York—and we brought two shipments of them, something over fifteen hundred boxes of axes in the last six weeks from New York State.

Q. 28. Notwithstanding the very much higher rate by rail from Evansville and Cincinnati to Nashville, than by water, the railroads do almost the entire through business, do they not?

A. Yes, sir.

Q. 29. And for how many years has that been the case, or about how many years?

A. I think about fifteen or sixteen years.

Q. 30. Notwithstanding the comparatively low rates which you charged them, the railroads still do the business?

A. Yes, sir; the shippers seem to give them the preference.

Q. 31. Can you state the distance by the Ohio and Cumberland rivers from Cincinnati to Nashville?

A. Yes, sir, it is quite six hundred and ninety miles from Cincinnati to Nashville, by river.

Q. 32. Can you state the distance by the two rail lines from Cincinnati to Nashville?

A. No, sir, I cannot.

217 Q. 33. Can you state the difference by river from Evansville to Nashville?

A. Three hundred and forty miles.

Q. 34. Can you state the distance by rail from Evansville, the direct, short line?

A. I think it is one hundred and fifty-seven miles.

Q. 35. If the rates by the direct rail lines are reasonably low, can the steamers on the rivers, all the river lines, successfully compete with such rail lines?

A. Well, it is according to how low they get it. We are handling freight very low now. It is very difficult for us to make money. We have to economize in every department very closely on account of the competition of the railroads.

Q. 36. Notwithstanding your very low rate, you do not get the traffic?

A. We get some. We handle a world of fruit jars from the interior of Indiana.

Q. 37. I am talking about through shipments from New York and eastern cities.

A. Very few of them.

Q. 38. Which is the better mode of transportation, water or rail?

A. Well, I have to advocate the river.

Q. 39. Is it your sincere opinion that the river transportation is preferable?

A. Not from New York. My honest opinion is, it would be better all-rail.

Q. 40. Do not railway trains, as a general thing, make better time than boats or vessels?

A. Yes, sir.

Q. 41. Is not time an element of great importance in commercial transactions?

A. Yes, sir, it is so considered.

Q. 42. Are not rivers, as a general rule, much more circuitous and less direct than rail lines?

A. Yes, sir.

Q. 43. Do not rail lines over which many trains are run daily, transport a very much greater tonnage of freight than water lines, as a general rule?

A. As a general rule, yes, I think so.

Q. 44. What is the average number of cars in a freight train, if you know?

A. I do not know.

Q. 45. What is the average number of tons per car, if you know?

A. I do not know.

Q. 46. Is not transportation by river steamers more hazardous than transportation by rail?

218 A. I do not think so, in this day and time.

Q. 47. Are not goods when transported by river steamers, insured?

A. As a general thing, yes, sir.

Q. 48. Do you know whether or not that is the case as to goods transported by rail?

A. No, sir, I do not.

Q. 49. Is it not a fact that the railway lines have a monopoly on their own road-bed and rail, while rivers and navigable bodies of water are public highways, free and open to all ships and steamers?

A. Well, I do not know much about the railroads' rights. I know that the waterways are public highways and free to every one.

Q. 50. Have not rail lines the advantage over water lines in respect to the handling of traffic?

A. Yes, sir.

Q. 51. Is not through traffic from New York and other eastern cities hauled through to Nashville in car loads and in the same cars in which they are loaded at New York and such northeastern cities?

A. I understand that is the case.

Q. 52. There is no charge for transfers—lighterage, or wharfage—on the transportation of goods from New York and other northeastern cities by rail to Nashville, is there?

A. I do not know.

Q. 53. Since railways have come into existence, has not the business of the river lines on through hauls, almost entirely ceased?

A. Except to some places. From St. Louis to New Orleans, they have competition there with the railroads. I do not think the railroads will ever be able to overcome that. That is a barge line out of St. Louis—handling grain out of St. Louis.

Q. 54. Is not most of the business done by your boats on the Cumberland river, local business between the different landings on the river?

A. No, sir. I never have made a comparison, but I think it about equals the through business; that is, what we call through business from Pittsburg and Cincinnati, about on the whole, equals our local business.

Q. 55. That business, however, is not business from New York and other eastern cities destined to Nashville, is it?

A. Some shipments are made that way. I never noticed them closely. They just pass through and are delivered.

219 Q. 56. It is very rare that that is the case, is it not?

A. No, sir; we have some shipments every season. We handle a good deal of iron and heavy hardware from Pennsylvania, and from up in the neighborhood of Pittsburg—a little out in the interior.

Q. 57. Destined for Nashville?

A. Yes, sir.

Q. 58. Have you any competition on the Cumberland river with other lines?

A. Not at present, we usually have, though.

Q. 59. Are your steamers very light-draft steamers?

A. Very light. I suspect the lightest draft on the western waters. They are considered by the steamboat men on the western rivers, as having the lightest draft boats built. In fact the Cumberland River steamboat men are noted for being able to build the lightest draft boats.

Q. 60. The boats have to be of light draft in order to navigate the river?

A. Yes, sir; on account of the frequent low water. We have a boat now that is just been completed, that will carry three hundred and twenty-five tons. When she is light she draws about fourteen inches. When loaded, she carries about three hundred and twenty-five tons and draws about four feet.

Q. 61. What is the mouth of the Cumberland river?
A. Smithland is at the mouth.
Q. 62. What is the distance by the Ohio river from Cincinnati to he Smithlands?
A. It is called four hundred and ninety miles from Cincinnati to he Smithlands.
Q. 63. What is the distance from Paducah to Smithland?
A. Twelve miles.
Q. 64. What is the distance from Evansville to Smithland?
A. One hundred and thirty-eight miles.

Redirect examination.

By Mr. BAXTER:

Q. 1. Please look at an official classification No. 16, adopted by ie Joint Traffic Association, to take effect January 1st, 1897, here nown you, and state how sugar, not otherwise specified, in bags, alf barrels, or barrels, is classified in less than car-loads and in car-loads.

20 A. Sugar, not otherwise specified, in bags, barrels, or half barrels, subject to Rule 5 B, less than car-loads, 4th class; r-load lots, 6th class.

Q. 2. Look at the same classification, and state how molasses in gs, barrels or hogsheads, is classified.
A. Molasses in kegs, barrels or hogsheads, less than car-loads, h class; car-loads, 5th class.
Q. 3. Is not steamboat transportation on the Ohio and Cumber-nd rivers the cheapest mode ever known in that section of the untry?
A. Decidedly so.
Q. 4. What is the difference in time in the transportation of ight from Evansville to Nashville by river as compared with its nsportation by rail?
A. I cannot tell what the rail makes, but our shippers here—we ing a good deal of stuff out of Evansville—they tell me that we equently beat the railroads.

Counsel for the commission objects to this answer as hearsay.

Q. 5. How much time is required by the river for the transporta-n of freight from Evansville to Nashville?
A. About two days and three-quarters.
Q. 6. What is the distance from Evansville to Nashville by rail?
A. I think it is quite 157 miles.
Q. 7. What is the average speed of freight trains in this section the country?
A. I really do not know.
Q. 8. Where freight is shipped from New York via Evansville to shville and has to be transferred from cars at Evansvills to a at for Nashville, how is the transfer made—by drays or are the rs brought down alongside the wharf-boats?
A. By drays and wagons.

Q. 9. Is there not a line of railway leading down to the wharf-boat at Evansville?

A. No, sir; the Louisville & Nashville railroad has a side track, and incline track down below the city wharf at Evansville. We have landed there frequently and put out hoop poles and lumber and such freight as that on the cars on that incline track. Anything could be dropped down there and loaded in the boat.

Q. 10. What is the cost per hundred pounds for transfer by dray from the cars at Evansville to a steamboat there?

A. From two to three cents a hundred.

Q. 11. What does the wharf-boat charge for storing freight from the time it is delivered to it until it is put on board the steamboat.

221 A. We pay the wharf-boat for that so much a trip. We pay them ten dollars for receiving our trip. Whatever it may be, a light load or a heavy load, it is so much for each trip. There is no wharf-boat charge on shipments of that character.

Q. 12. Well, then, the only difference in time between the transportation of freight from Evansville to Nashville and the time required by rail, would be the two and three-quarters days by river as against whatever time may be required by rail?

A. Yes, sir.

Q. 13. And the cost of transfer or drayage at Evansville from the cars to the boat does not exceed two or three cents a hundred pounds?

A. That is the arrangement we had there for transferring freight.

Q. 14. Now, what does the insurance of freight carried upon steamboats cost?

A. On the Cumberland river, we have very little insurance. Rarely anybody insures on the Cumberland. I have always understood it was figured at three cents a hundred pounds. It would cut that figure in the rates, about three cents a hundred pounds.

Q. 15. What length of time is required to make a transfer of freight from the cars to a steamboat at Evansville?

A. I do not think it takes any very great while. They have ample transfer facilities there.

Q. 16. What is the distance from the railroad depot to the steamboat landing or wharf-boat?

A. It is ten or twelve blocks to the roads we connect with, the P., D. & E. and the Evansville & Terre Haute.

Q. 17. Then, if I understand you, the insurance of three cents a hundred pounds and the transfer of three cents a hundred pounds at Evansville, making six cents a hundred pounds in all, is the only additional cost between shipping freight by rail to Evansville and thence via boat to Nashville as against shipping via all rail from New York to Nashville?

A. I think so. That is, all shipments we get from beyond Evansville come that way without any extra charge on them. The railroad makes the rate to the river. They include the transfer in this rate. In discussing the question of through shipments here, I ask them to quote rate to the river at Evansville, the railroads being

right there and being in touch with the transfer men are able to secure better transfer rates than we could here. They just get a rate to the river, delivered to the wharf-boat.

Q. 18. Then the rate from New York to Evansville would
222 include the delivery to the steamboat or the wharf-boat?

A. I do not know how those rates would be. I do know this, that on glassware coming from the interior of Indiana, they will give us the same rate to the river that they figure for the Louisville & Nashville railroad in the depot.

Q. 19. After the freight arrives at Nashville, what is the difference in the drayage cost from the steamboat landing to the merchants' stores and from the railroad depot to the same merchants' stores?

A. I do not know whether there is any difference at all. As a general thing, the wharf is closer to more of the business portion of the city than the depot is.

Recross-examination.

By Mr. SHAVER:

Q. 1. What kind of traffic constitutes the bulk of the traffic transported by your line from Evansville to Nashville?

A. We get at Evansville buckets, brooms, sieves, tubs, furniture, molasses, pickles and glucose. It is just a miscellaneous cargo.

Q. 2. Are the two lines of steamers you mention here under one ownership?

A. Yes, sir.

Q. 3. Then it is really one line to Evansville and one to Paducah?

A. It is all one in reality.

Q. 4. You just give it that name?

A. We just give it that name. It is not incorporated.

Q. 5. Are all five boats under one ownership?

A. Under one management, known as the Ryman line.

Q. 6. You have no competitive line on the river?

A. Not just now; we usually have. The river is free and we never pass a season without some competition. We have a good hold on the people from the fact that our river being susceptible to low water, when it gets down and there is no money in making trips, we run our boats just as long as it is possible to do it. The result is, the public stays with us, that is, the best shippers, and we overcome competition in that way. We do not advance the rates when the low water comes; we keep the same rate in effect in low water as in high water.

Q. 7. A number of years ago there were a number of lines on the river?

A. A number of them. We had a line from Pittsburg to
223 Nashville; a big line from Cincinnati to Nashville, consisting of five large boats, some of them side-wheelers; and we had a line from St. Louis to Nashville, and a line from Memphis to Nashville, and one from New Orleans to Nashville.

Q. 8. What has caused all these lines to go out of business?

A. Railroad competition.

Q. 9. Can you state how long ago it is that these various lines ceased business on the river?

A. No, sir; I could not recall that to memory just now.

Q. 10. About how many years?

A. About twenty-one or twenty-two years.

Redirect examination.

By Mr. BAXTER:

Q. 1. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

A. No, sir.

NASHVILLE, TENN., *July 15th*, 1897.

JOSEPH M. BROWN, a witness on behalf of the defendants, having been duly sworn, testified as follows:

Direct examination.

By Mr. BAXTER:

Q. 1. State your name, age, residence and occupation.

A. Joseph M. Brown; forty-second birthday; my residence is Marietta, Georgia; that is my personal residence; my official residence is Atlanta; occupation, traffic manager of the Western & Atlantic railroad.

Q. 2. How long have you been connected with railroad freight transportation business in the United States, and in what capacities?

A. Since the 1st day of January, 1877. I went into the service as freight clerk and filled a number of subordinate positions, as freight conductor, lost-car agent and inspection agent here at Nashville, claim agent, car accountant, general freight agent, general freight and passenger agent, and traffic manager.

Q. 3. Did the proportions which the Western & Atlantic
224 railroad receive on the various classes of freight shipped from New York and Boston via Atlanta and Chattanooga to Nashville in 1892, exceed the additional cost to said railroad of the movement of said freight?

A. The proportions which the Western & Atlantic received on the various classes of freight shipped from New York and Boston via Atlanta to Nashville in 1892, exceeded the additional cost to the Western & Atlantic railroad for the movement of said freight.

Q. 4. The rates from New York and Boston to Chattanooga in 1892 were as follows:

Classes	1	2	3	4	5	6
Cents	114	98	86	73	60	49

State whether in your opinion said rates were just or unjust, reasonable or unreasonable, and give your reasons for any opinion you may express.

A. The rates from New York and Boston to Chattanooga in 1892, in my opinion, were just and reasonable. This conclusion is reached from the fact that the rates were fixed by the tariff officials of the lines interested who carefully adjusted all conflicting interests and so arranged the rates as to give all the trade centers competing for the trade in certain territories just and equitable figures. The rates to Chattanooga, Birmingham, Rome, Dalton, Atlanta, Anniston and Athens are practically the same. A glance at the map will show these points, especially Chattanooga, Birmingham, Anniston, Rome and Atlanta, are grouped in so far as the rates and competitive territory is concerned, each town has about the same amount of what we may term "non-competitive territory."

In the case of Chattanooga, it has near-by mining towns on the Cincinnati Southern railway and the Nashville, Chattanooga & St. Louis railway; also some stations on the Memphis & Charleston, the Chattanooga Southern and the Alabama Great Southern.

Q. 5. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

A. I know of no other particular reasons. The general understanding is that to these points in the same general territory we endeavor to so adjust the through rates as to enable all the points in question to compete fairly for the trade and to control the
225 territory that is properly, geographically speaking, and I mean by that, in geographical proximity to their own.

Cross-examination.

By Mr. SHAVER:

Q. 1. Is not the Nashville, Chattanooga & St. Louis road owned or controlled by the Louisville & Nashville road?

A. Well, sir, I do not know about that; I could not tell you.

Q. 2. What roads actually reach Nashville?

A. The Louisville and Nashville and the Nashville, Chattanooga & St. Louis Railway systems, I believe.

Q. 3. Two roads?

A. Yes, sir.

Q. 4. What roads actually reach Chattanooga?

A. The Cincinnati, New Orleans & Texas Pacific; Nashville, Chattanooga & St. Louis, and I presume you may say the Memphis & Charleston, as that has a running arrangement with the Nashville, Chattanooga & St. Louis, whereby solid trains go through from Memphis to Chattanooga; the Alabama Great Southern; the Chattanooga Southern; the Chattanooga, Rome & Columbus; the Western & Atlantic; and two divisions of the Southern railway,

one leading southward by Rome and the other eastward by Knoxville.

Q. 5. Chattanooga is also situated on the Tennessee river, is it not?

A. Yes, sir.

Q. 6. The rates from New York and Boston to Chattanooga are as follows on the six numbered classes:

Classes	1	2	3	4	5	6
Cents	114	98	86	73	60	49

You have stated that those rates were, in your opinion, reasonable.

The rates from New York and Boston on a haul through Chattanooga and 151 miles further on to Nashville, are as follows:

Classes	1	2	3	4	5	6
Cents	91	78	60	42	36	31

Are those rates to Nashville also reasonable in and of themselves in your opinion?

A. Yes, sir.

Q. 7. You stated in your direct examination that the pro-
226 portion of the through rates from New York and Boston to Nashville received by your road paid something in excess of the additional cost?

A. Yes, sir.

Q. 8. How do you ascertain or know that those rates pay something in addition to the additional cost of movement?

A. The business that we handle from New York and Boston to Nashville goes in our north-bound cars. I presume about 70 per cent. of our movement is south bound and if we can put freight in those empty cars going north bound, we can afford to haul it at materially less expense than we could coming south because the cars are already down here and have to go back whether loaded or empty; and in the other case we scarcely ever bring an empty car south bound. In order to be explicit, I know of no empty cars we bring south at all, except occasionally flat cars for lumber and fruit cars for peaches and watermelons and things of that kind.

Q. 9. Is a rate reasonable in and of itself which does not yield the carrier a proper remuneration over and above the cost of service of carriage?

A. I should say not. If carried for less than cost, it would be unreasonably low.

Q. 10. Can it be ascertained whether a rate is reasonably remunerative to the carrier without first ascertaining the cost or expense of the service of carriage?

A. Well, it is very hard to determine regarding each particular shipment. Probably it is impossible to determine regarding each particular shipment, whether it, considered by itself, is remunerative or not. There are so many conditions attending the running of trains and so many cars that an engine can carry, and things of

that kind, that I do not see how we can lay down a general rule that would cover the case.

Q. 11. Is not the expense of the service of carriage an element to be considered in determining whether a rate or set of rates is reasonable?

A. In general, yes.

Q. 12. Does not the cost or expense of the service of transportation depend largely or to some extent on the length of the haul, other things being equal?

A. Well, I should say that is a factor.

Q. 13. Other things being equal, is not the consumption of time greater, the greater the length of the haul?

A. Necessarily so, other things being equal.

Q. 14. Other things being equal, is not the consumption of fuel greater, the greater the length of the haul?

A. As a general proposition, yes.

227 Q. 15. Other things being equal, is not the wear and tear on locomotives, cars, tracks, road-bed, etc., greater, the greater the length of the haul?

A. Yes, sir; the more miles to be traversed, the more the wear and tear on the tracks and things of that kind, as a general proposition.

Q. 16. Other things being equal, is not the cost of keeping the road in repair or in good condition greater, the greater the length of the road?

A. All other things being equal, I should say so.

Q. 17. Other things being equal, does it not require more locomotives and cars and crews for the running of trains on a long road than on a short one?

A. That would vary with the length of the road quite materially.

Q. 18. Other things being equal does not distance add to the cost of building a road and are not therefore the fixed charges, such as interest on the capital invested, greater, the greater the length of the road?

A. The character of the country being the same, whether a plain country or mountains, I should say so.

Q. 19. Would higher rates be charged to Nashville than are now charged but for competition?

A. Yes, sir, we would charge higher rates than we do but for competition.

Q. 20. How long have you been engaged in the railroad business east of the Mississippi and south of the Virginias and the Ohio river?

A. Something over twenty years.

Q. 21. Has the greater charge for the shorter than the longer haul, over the same line, in the same direction, the shorter haul being included in the longer, ever, to your knowledge, been made in that territory, except in cases of competition, in transportation to the longer-distance point?

A. I do not know that it has, sir, of my own observation.

Q. 22. Are not the rates by all lines from New York and Boston to Nashville, the same?

A. The rates by all lines, so far as I understand, are the same from Boston and New York to Nashville.

228 R. E. LUTZ, a witness on behalf of the defendants, having been duly sworn, testified as follows:

Direct examination.

By Mr. BAXTER:

Q. 1. State your name, age, residence and occupation.

A. R. E. Lutz; residence, Montgomery, Alabama: age, forty-six: freight traffic manager of the Atlanta & West Point railroad and the Western Railway of Alabama.

Q. 2. How long have you been engaged in the railroad transportation business and in what capacities?

A. Transportation and traffic, about twenty-eight years. I first started out as a telegraph operator, then as local agent, then as chief clerk in the general freight office, afterwards general agent, and then traffic manager.

Q. 3. The rates from New York via Bristol to Chattanooga, were in 1892, as shown by the report and opinion of the commission as follows:

Classes	1	2	3	4	5	6
Cents	114	98	86	73	60	49

The distance from New York via Bristol to Chattanooga is 901 miles. Please state whether or not, in your opinion, said rates are just or unjust, reasonable or unreasonable, and give your reason for any opinion you may express.

A. In my opinion, the rates as in effect from New York to Chattanooga are reasonable and just. There being no absolute standard by which the reasonableness of rates may be measured, makes it difficult, not being in possession of the statistics affecting the traffic in question, to determine conclusively as to the reasonableness and justness of such rates as are being used. It appears to me, however, that a fairly accurate conclusion can be arrived at by the comparison of the rates in effect to other points on the same line and also the rates in effect on other lines where the circumstances and conditions are similar.

We find that the rates from New York to Knoxville, Tennessee, via Bristol, 111 miles less than to Chattanooga, to be as follows:

Classes	1	2	3	4	5	6
Cents	100	85	70	55	48	40

a reasonable differential on account of the difference less than the rates to Chattanooga.

We find Rome, Georgia, over eighty miles further than to
229 Chattanooga, and to Atlanta, Georgia, 138 miles further than to Chattanooga, the all-rail rates via Bristol, to be as follows:

Classes	1	2	3	4	5	6
Cents	126	108	95	81	66	54

a reasonable differential on account of the difference higher than the rates to Chattanooga.

It is true that the rail and water rates to Atlanta and Rome are the same as to Chattanooga, but that is owing to the fact that the rail and water rates are made on the rates based on the steamship rates to the Atlantic Coast points of Charleston or Savannah, and the inland rates from those points, the same basis obtaining for making rail and water rates to Chattanooga and such rates to that point being likewise adopted by the all-rail lines.

The first six classes hardly give a fair idea of the reasonableness of the rates to Chattanooga, unless it is known and considered that these classes cover high-grade valuable goods that are shipped, as a rule, in small quantities, are frequently transferred and rehandled, thereby largely increasing the expense of the handling and giving rise for opportunity for the same to be damaged, robbed, stolen or lost, in which event the carriers have a heavy drain in the shape of claims on the revenue earned, the value of a small package of high-class goods amounting to many times the freight charges thereon.

Q. 5. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. No, sir.

Cross-examination.

By Mr. SHAVER:

Q. 1. Did you state in your answer to the direct interrogatories that the rates involved in this case from New York and Boston to Chattanooga, are just and reasonable in and of themselves, in your opinion?

A. Yes, sir.

Q. 2. The distance from Chattanooga to Nashville is 151 miles, by the Nashville, Chattanooga & St. Louis road, is it not?

A. I believe that is the distance.

Q. 3. Are the lower rates for the haul of 151 miles further, through to Nashville from New York and Boston, also, in your opinion, reasonable, in and of themselves?

230 A. Yes, sir, they are reasonable, brought about by active water competition to that point.

Q. 4. Do these rates to Nashville yield the carrier a revenue in excess of the cost of transportation?

A. Yes, sir, I believe they do.

Q. 5. Is a rate reasonable in and of itself, which does not yield the carrier a proper remuneration over and above the cost of the service of carriage?

A. No, I would not consider it a reasonable rate if it did not yield the carrier sufficient revenue over and above the cost of transportation.

Q. 6. Can it be ascertained whether a rate is reasonably remunerative to the carrier without first considering the cost or expense of the service of carriage?

A. That would be the only means we would have of knowing or trying to approximate as to about what the cost—that is, trying to find out the cost as near as you can of carrying a ton of freight per mile, or anything in excess of that, quite a number of things you have to take into consideration in saying whether that would be a profitable rate or not. For instance, you might at certain seasons of the year, haul certain freight on certain trains that had to move anyhow, whether they had one car or whether they had twenty. In that case you could probably move a car of freight or a ton of freight at much less expense than you could had you to provide special service, or if it were at other times of the year. There are times when we accept certain freights that we would not accept at other times. I will take the local freight, for instance, that will run between Atlanta and West Point. That train has got to run; we have got to pay the engineer and we have got to pay the crew; and by adding on probably one or two more cars or something of that kind, it probably would not add to the cost of the train but very little more. Now, if we had to go to work to perform a certain service for a certain class of low freight, we often could not afford to haul it; we would not haul it; we turn down lots of it.

Q. 7. The transportation of the hindmost car would cost the road as much for transporting it the same distance as it costs for the foremost car?

A. That would not always be the case for the very reason that the foremost car would not be switching back and forth as such, being attached to the engine and the wear and tear of that car, and the cost of repairs on that car and accidents to that would not be as great as the hindmost car that was constantly being switched from the point of shipment to the final destination. Going into
231 the switch so often might cause a draw-frame to be pulled out or a brake-beam broken, or something of that kind, and even if no accident happened to the car, there is obliged to be more wear and tear on that car.

Q. 8. Does not the cost or the expense of the service of transportation depend largely or to some extent on the length of the haul, other things being equal?

A. Yes, sir.

Q. 9. Other things being equal, is not the consumption of time greater, the greater the length of the haul?

A. Yes, sir.

Q. 10. Other things being equal, is not the consumption of fuel greater, the greater the length of the haul?

A. Yes, sir.

Q. 11. Other things being equal, is not the wear and tear of locomotives, cars, track and road-bed, etc., greater, the greater the length of the haul?

A. Yes, sir.

Q. 12. Other things being equal, is not the cost of keeping the road in repair or good condition greater, the greater the length of the road?

A. Yes, sir.

Q. 13. Other things being equal, does it not require more locomotives and cars and crews for running a train on a long road, than on a short one?

A. Yes, sir.

Q. 14. Other things being equal, does not distance add to the cost of building a road, and are not therefore, the fixed charges, such as interest on the capital, greater, the greater the length of the road?

A. Yes, sir.

Q. 15. Is not the expense to the carrier on strictly local hauls greater per ton per mile than on long through hauls?

A. Yes, sir.

Q. 16. How long have you been engaged in the railroad business in the territory east of the Mississippi and south of the Virginias and the Ohio river?

A. Nearly twenty-five years.

Q. 17. Has the greater charge for the shorter than the longer haul over the same line in the same direction the shorter haul being included in the longer, ever, to your personal knowledge, been made in that territory except in cases of competition in transportation to the longer-distance point?

A. No, sir.

Q. 18. Is not a rate under which traffic will move and
232 which is not so high, as to divert the traffic to other roads and lines, in your opinion, a reasonable rate?

A. Yes, sir.

Q. 19. In your examination this morning in the case of the Interstate Commerce Commission against the Western & Atlantic Railroad, *et al.*, involving rates from Cincinnati to Atlanta and to intermediate points between Chattanooga and Atlanta, you named a number of lines which actually and actively compete for business from Cincinnati to Chattanooga. Will you please state those lines in this case?

A. Those lines are as follows:

The Cincinnati, New Orleans & Texas Pacific railway, and the Louisville & Nashville railroad are the two most active competitors for freight from Cincinnati to Chattanooga.

The Chesapeake & Ohio railroad; Cincinnati, Hamilton & Dayton railroad; the Baltimore & Ohio Southwestern railroad, in connection with the Norfolk & Western railroad through Kenova, West Virginia, Ironton and Portsmouth, Ohio, likewise compete, Cincinnati to Chattanooga, especially now that the association has been

disbanded under which a territorial division of business was attempted between the western and eastern lines.

Not an impracticable route for business from Cincinnati to Chattanooga is via the Ohio and Mississippi rivers to Memphis and thence via the Memphis & Charleston railroad.

There is also water competition via the Ohio and Tennessee rivers.

Q. 20. Did you not also in your examination in that case mention that Chattanooga is on the Tennessee river?

A. Yes, sir.

Q. 21. Does that give Chattanooga water communication?

A. Yes, sir.

Q. 22. With what points?

A. Most all points on the Ohio river and all points via the Ohio river.

Q. 23. Will you please name the roads that actually reach Chattanooga?

A. The Nashville, Chattanooga & St. Louis railroad.

The Cincinnati, New Orleans & Texas Pacific railway.

The Memphis & Charleston railroad.

The Chattanooga Southern railway.

The Southern railway.

The Western & Atlantic railroad.

233 The Chattanooga, Rome & Columbus railroad.

Q. 24. What roads actually reach Nashville?

A. The Nashville, Chattanooga & St. Louis railway, and the Louisville & Nashville railroad.

Q. 25. State, if you know whether or not the Nashville, Chattanooga & St. Louis railway is owned by or under the control of the Louisville & Nashville system?

A. Not to my knowledge; it may or may not be; I do not know that it is.

NASHVILLE, TENN., *July 17th*, 1897.

W. A. WINBURN, a witness on behalf of the defendants, having been duly sworn, testified as follows:

Direct examination.

By Mr. BAXTER:

Q. 1. State your name, age, residence and occupation.

A. W. A. Winburn; age 37; residence, Savannah, Ga.; occupation, general freight agent of the Central Railway Company.

Q. 2. How long have you been engaged in the railroad transportation business, and in what capacities?

A. Since 1881; as clerk in the local freight office; clerk in the assistant general freight office; division freight and passenger agent, and general freight agent, respectively.

Q. 3. Did the proportions which the Central Railway of Georgia received on the different classes of freight shipped from New York and Boston via Savannah destined to Nashville, in 1892, exceed the

additional cost to the said Central of Georgia railway, of the movement of said freight?

A. I think they did.

Q. 4. The report and opinion of the commission in this case shows that the rates from New York and Boston to Chattanooga were as follows:

Classes	1	2	3	4	5	6
Cents	114	98	86	73	60	49

In your opinion were the above rates just or unjust, reasonable or unreasonable? Please give your reasons for any opinion you may express.

A. I think they were just and reasonably low.

First, because they were not higher than to surrounding points similarly situated.

Second, because the revenue derived by the Central of
234 Georgia railway on these and other tariffs constructed on the same general plan has not yielded a sufficient income to pay the interest on the bonded debt of the company.

Q. 5. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. I do not think I know of anything else.

Cross-examination.

By Mr. SHAVER:

Q. 1. Are the rates from New York and other northeastern cities involved in this case to Chattanooga, in your opinion, reasonable in and of themselves?

A. I think so.

Q. 2. Are the lower rates from New York and other northeastern cities on hauls through Chattanooga and 151 miles further to Nashville also, in your opinion, reasonable, in and of themselves?

A. We would like to see them higher, but they are rates made by the trunk lines and their connections through the Ohio River gateways, I believe, and pay us, we think, a margin of profit above the cost of transportation, and we choose to compete for the business.

Q. 3. About how far is it by the Cincinnati, New Orleans & Texas Pacific railway from Cincinnati to Chattanooga?

A. 335 miles.

Q. 4. How far is it from Cincinnati by the Louisville & Nashville railroad to Nashville?

A. 295 miles.

Q. 5. Is a rate, in your opinion, a reasonable rate, which does not yield the carrier a proper remuneration over and above the cost of the service of carriage?

A. That depends on what we call a "proper remuneration" above the cost of carriage. It seems to me there are a great many cases

where a rate would be reasonable if it were above the cost of carriage to any extent, dependent largely on the movement of traffic in different directions.

Q. 6. Can it be ascertained whether a rate is reasonably remunerative to the carrier without first considering the cost or expense of the service of carriage?

A. The cost of carriage is an uncertain quantity, varying on almost every class of freight, and varying on the same classes of freight at different times and moving in different directions.

235 Q. 7. I understand that, but that is not an answer to my question. My question is, can it be ascertained whether a rate is reasonably remunerative to the carrier without first considering the cost or the expense of the service of carriage? In other words, can it be ascertained whether a rate pays a carrier a proper remuneration without first considering the expense of the cost of carriage?

A. As it is impossible to ascertain the cost of carriage in a great majority of cases, it is difficult to tell whether any particular rate on any particular traffic will pay a profit. We have as a guide, the general tariffs; we know what the out-turn is from those tariffs and we vary them as necessity requires, and after all, when we get down to rate-making on heavy commodities, which require low rates of transportation, it is largely a rule of thumb process. By observation and experience and practice, we ought to know, and we try to know whether we are going to lose money on a particular shipment. If we think we are going to lose money, we will not take it. If we think it pays, we will take it. Whether we always make a profit we do not know.

Q. 8. Is it your opinion, then, that it is impossible for a carrier to ascertain whether a given rate is reasonably remunerative?

A. My answer had reference particularly to exceptionally low rates, that is rates lower than the general standard of rates. In cases of this kind, I think it is frequently impossible to tell whether you will make or lose money for the carriage.

Q. 9. Does not the cost or the expense of the service of transportation depend largely or to some extent on the length of the haul, other things being equal?

A. All other things being the same, I would say that the cost of the haul per mile would decrease as the length of the haul increased, not in any given ratio, but to some extent at least.

Q. 10. Would not the aggregate cost increase as the length of the haul increased, other things being equal?

A. All other conditions being equal; yes.

Q. 11. All other things being equal, is not the consumption of time, greater, the greater the length of the haul?

A. Yes, sir.

Q. 12. All other things being equal, is not the consumption of fuel greater, the greater the length of the haul?

A. I do not know much about the consumption of fuel. I would not like to give an expert opinion on that, as I do not handle any fuel.

236 Q. 13. All other things being equal, is not the wear and tear on locomotives, cars, tracks, road-bed, etc., greater, the greater the length of the haul?

A. I think so.

Q. 14. Other things being equal, is not the cost of keeping the road in repair or in good condition greater, the greater the length of the road?

A. That I know nothing about at all.

Q. 15. Other things being equal, does it not require more locomotives and crews for running trains on a long road than on a short one?

A. I think that depends a great deal upon how much longer the long road is than the short road.

Q. 16. Other things being equal, does not distance add to the cost of building a road, and are not therefore the fixed charges, such as interest on the capital invested, greater, the greater the length of the road?

A. Yes, sir.

Q. 17. How long have you been engaged in the railroad business in the territory east of the Mississippi and south of the Virginias and the Ohio river?

A. Sixteen years.

Q. 18. Has the greater charge for the shorter than the longer haul over the same line in the same direction, the shorter haul being included in the longer, ever, to your personal knowledge, been made in that territory, except in cases of competition in transportation to the longer-distance point?

A. I can think of no such case at present.

Q. 19. Is not a rate under which traffic will move, and which is not so high as to divert the traffic to other roads or lines, in your opinion a reasonable rate?

A. Yes, sir.

NASHVILLE, TENN., *July 19th*, 1897.

GEO. R. KNOX, a witness on behalf of defendant-, having been duly sworn, testified as follows:

Direct examination.

By Mr. BAXTER:

Q. 1. State your name, age, residence and occupation.

A. Geo. R. Knox; 52; Nashville, Tenn.; general freight agent, Nashville, Chattanooga & St. Louis railway.

Q. 2. How long have you been connected with the railroad freight transportation business, and in what capacities?

237 A. I was in the local freight office, and in the accounting department for some time before entering the general freight office of the Nashville, Chattanooga & St. Louis railway. I have been in the general freight office since March, 1867, as subordinate clerk, chief clerk, assistant general freight agent, and general freight agent.

Q. 3. It appears from the report and opinion of the commission in this case, that the rates from New York and Boston to Nashville, in December, 1892, were as follows:

Classes	1	2	3	4	5	6
Cents	91	78	60	42	36	31

What were the proportions in cents per hundred pounds received by the Nashville, Chattanooga & St. Louis railway between Chattanooga and Nashville on each of the classes of freight shipped from New York and Boston via Chattanooga to Nashville?

A. Said proportions are as follows:

From Boston:

Route.	1	2	3	4	5	6	Dry goods, boots and shoes.
Hagerstown	12.5	10.7	8.2	5.8	4.9	4.2	12.5
Alexandria	10.	8.5	6.4	3.7	3.5	3.1	8.9
Savannah	13.5	11.6	8.7	5.8	5.	4.3	12.5
Charleston	10.5	8.9	6.2	3.7	2.8	2.5	9.4
Norfolk	11.4	9.9	7.5	5 2	4.5	4.	10.5
Portsmouth	13.7	11.8	8.9	6.	5.1	4.4	12.7

From New York:

Hagerstown	14.3	12.2	9.4	6.6	5.9	4.9	14.3
Alexandria	11.2	9.7	6.8	4.8	4.2	3.7	10.
Savannah	14.3	12.3	9.2	6.2	5.2	4.5	13.2
Charleston	13.4	9.8	8.7	5.9	5.	4.3	12.3
Norfolk	12.2	10.5	7.9	5.2	4.4	3.8	11.3
Portsmouth	14.1	12.1	9.1	6.	5.1	4.3	13.

Q. 4. What did those proportions amount to in cents per ton per mile on each of the classes?

A. The proportions amounted in cents per ton per mile on each of the classes as follows:

From Boston:

	1	2	3	4	5	6	D. goods, B. & S.	Total.	Average.
Hagerstown	1.6	1.4	1.1	.76	.65	.55	1.6	7.66	1.10
Alexandria	1.3	1.1	.84	.48	.45	.41	1.1	5.68	.81
Savannah	1.7	1.5	1.1	.77	.67	.57	1.6	7.91	1.13
Charleston	1.4	1.2	.83	.50	.37	.33	1.2	5.83	.83
Norfolk	1.5	1.3	1.	.69	.60	.52	1.4	7.01	1.00
Portsmouth	1.8	1.5	1.1	.80	.68	.59	1.7	8.17	1.17
Total	9.3	8.	5.97	4.	3.42	2.97	8.6	42.26	6.04
Average	1.55	1.33	.99	.67	.57	.50	1.43		7.04

General average per ton 1.01

238 From New York:

	1	2	3	4	5	6	D. goods, B. & S.	Total.	Average.
Hagerstown	1.9	1.6	1.2	.90	.70	.65	1.9	8.85	1.26
Alexandria	1.5	1.3	.90	.63	.55	.49	1.3	6.67	.95
Savannah	1.9	1.6	1.2	.90	.69	.60	1.7	8.59	1.23
Charleston	1.8	1.3	1.15	.77	.66	.56	1.6	7.84	1.12
Norfolk	1.6	1.4	1.	.68	.58	.50	1.5	7.26	1.04
Portsmouth	1.9	1.6	1.2	.78	.70	.57	1.7	8.45	1.21
Total	10.6	8.8	6.65	4.66	3.88	3.37	9.7	47.66	6.81
Average	1.77	1.47	1.11	.78	.65	.56	1.60		7.94
General average per ton per mile									1.13

Q. 5. Did the proportions which said road received on said different classes of freight shipped from New York and Boston via Chattanooga to Nashville in 1892 exceed the additional cost to said road of the movement of said freight?

A. It did.

Q. 6. Suppose the rates from New York and Boston via Chattanooga to Nashville were increased so as to be made the same as the rates from New York and Boston to Chattanooga, what would be the effect upon the Nashville, Chattanooga & St. Louis railway, as to its being able to obtain any of said traffic?

A. It would receive none of it at those rates.

Q. 7. Why not?

A. It would still reach Nashville by other routes at the present rates.

Q. 8. What mount of revenue is annually received by the Nashville, Chattanooga & St. Louis railway from traffic shipped from New York, Boston, and other northeastern cities via Chattanooga to Nashville?

A. Well, it will run from twenty to twenty-five thousand dollars annually.

Q. 9. I understand, then, that the loss to the Nashville, Chattanooga & St. Louis railway, if it should raise the rates to Nashville, so as to be as high as those to Chattanooga, would amount to from twenty to twenty-five thousand dollars a year?

A. Yes, sir.

Q. 10. The rates from New York and Boston to Chattanooga in 1892 were as follows:

Classes	1	2	3	4	5	6
Cents	114	98	86	73	60	49

State whether said rates from New York and Boston to Chattanooga were just or unjust, reasonable or unreasonable, and give your reasons for any opinion you may express.

A. I consider the rates from New York and Boston to Chattanooga just and reasonable for the reason that they do not
239 allow the carriers exorbitant revenue for the service performed; furthermore, that they compare favorably with other rates for similar distances and services in the same territory

Q. 11. Please state each route, whether rail, water, or rail and water, which actually competed in 1892 for the transportation of freight from New York via Chattanooga to Nashville.

The routes were as follows:

From Boston:

Route No. 1:

The New England & Savannah Steamship Company via Savannah, three hundred miles.

Central of Georgia Railway Company, via Atlanta, 294 miles.

Western & Atlantic railroad, via Chattanooga, 138 miles.

Nashville, Chattanooga & St. Louis railway, via Nashville, 151 miles.

Route No. 2:

Clyde steamship line, via Charleston, 300 miles.

South Carolina & Georgia railroad, via Augusta, 138 miles.

Georgia railroad, via Atlanta, 171 miles.

Western & Atlantic railroad, via Chattanooga, 138 miles.

Nashville, Chattanooga & St. Louis railway, via Nashville, 151 miles.

Route No. 3:

Merchants' & Miners' Transportation Co., via Norfolk, three hundred miles.

Norfolk & Western railroad, via Bristol, 408 miles.

Southern railway, via Chattanooga, 242 miles.

Nashville, Chattanooga & St. Louis railway, via Nashville, 151 miles.

Route No. 4:

Merchants' & Miners' Transportation Co., via Portsmouth, 300 miles.

Seaboard air line, via Atlanta, 595 miles.

Western & Atlantic railroad, via Chattanooga, 138 miles.

Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 5:

Merchants' & Miners' Transportation Co., via Norfolk, 300 miles.

240 Southern railway, via Chattanooga, 626 miles.

Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 6:

Merchants' & Miners' Transportation Co., via Pinner's Point, 300 miles.

Atlantic Coast line, via Denmark, 390 miles.

South Carolina & Georgia railway, via Augusta, 57 miles.

Georgia railroad, via Atlanta, 171 miles.

Western & Atlantic railroad, via Chattanooga, 138 miles.

Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 7—Atlantic Coast Dispatch:

New York & New England railroad, via Willimantic, 86 miles.
New York, New Haven & Hartford, via New York, 127 miles.
Pennsylvania railroad, via Delmar, 215 miles.
New York, Philadelphia & Norfolk railroad, via Pinner's Point, 131 miles.
Atlantic Coast line, via Denmark, 390 miles.
South Carolina & Georgia railroad, via Augusta, 57 miles.
Georgia railroad, via Atlanta, 171 miles.
Western & Atlantic, via Chattanooga, 138 miles.
Nashville, Chattanooga & St. Louis, 151 miles.

Route No. 8—Atlantic Coast Dispatch:

New York, New Haven & Hartford, via New York, via New London, 234 miles.
Pennsylvania railroad, via Delmar, 215 miles.
New York, Philadelphia & Norfolk, via Pinner's Point, 131 miles.
Atlantic Coast line, via Denmark, 390 miles.
South Carolina & Georgia railroad, via Augusta, 57 miles.
Georgia railway, via Atlanta, 171 miles.
Western & Atlantic railroad, via Chattanooga, 138 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 9—Atlantic Coast Dispatch:

Boston & Maine railroad, via Northampton, 105 miles.
New York, New Haven & Hartford railroad, via New York, 151 miles.
241 Pennsylvania railroad, via Delmar, 215 miles.
New York, Philadelphia & Norfolk railroad, via Pinner's Point, 131 miles.
Atlantic Coast line, via Denmark, 390 miles.
South Carolina & Georgia railroad, via Augusta, 57 miles.
Georgia railway, via Atlanta, 171 miles.
Western & Atlantic railroad, via Chattanooga, 138 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 10—Atlantic Coast Dispatch:

Fitchburg railroad, via Shelburne Falls, 119 miles.
New York, New Haven & Hartford via New York, 174 miles.
Pennsylvania railroad, via Delmar, 215 miles.
New York, Philadelphia & Norfolk, via Pinner's Point, 131 miles.
Atlantic Coast line, via Denmark, 390 miles.
South Carolina & Georgia railroad, via Augusta, 57 miles.
Georgia railway, via Atlanta, 171 miles.
Western & Atlantic railroad, via Chattanooga, 138 miles.
Nashville, Chattanooga & St. Louis, 151 miles.

Route No. 11—Richmond & Danville Dispatch:

New York & New England railroad, via Willimantic, 86 miles.
New York, New Haven & Hartford, via New York, 127 miles.

Pennsylvania railroad, via Alexandria, 237 miles.
Southern railway, via Chattanooga, 710 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 12—Richmond & Danville Despatch:

New York, New Haven & Hartford railroad, via New York, 234 miles.
Pennsylvania railroad, via Alexandria, 237 miles.
Southern railway, via Chattanooga, 710 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 11—Richmond & Danville Despatch:

Boston & Maine railroad, via Northampton, 105 miles.
242 New York, New Haven & Hartford, via New York, 151 miles.
Pennsylvania railroad, via Alexandria, 237 miles.
Southern railway, via Chattanooga, 710 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 14—Richmond & Danville Despatch:

The Fitchburg railroad, via Shelburne Falls, 119 miles.
New York, New Haven & Hartford railroad, via New York, 174 miles.
Pennsylvania railroad, via Alexandria, 237 miles.
Southern railway, via Chattanooga, 710 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 15—Seaboard Dispatch:

New York & New England railroad, via Willimantic, 86 miles.
New York, New Haven & Hartford railroad, via New York, 127 miles.
Pennsylvania railroad, via Delmar, 215 miles.
New York, Philadelphia & Norfolk railroad, via Portsmouth, 131 miles.
Seaboard air line, via Atlanta, 595 miles.
Western & Atlantic railroad, via Chattanooga, 138 miles.
Nashville, Chattanooga & St. Louis railway, via Nashville, 151 miles.

Route No. 16—Seaboard Dispatch:

New York, New Haven & Hartford, via New London, New York, 234 miles.
Pennsylvania railroad, via Delmar, 215 miles.
New York, Philadelphia & Norfolk railroad, via Portsmouth, 131 miles.
Seaboard air line, via Atlanta, 595 miles.
Western & Atlantic railroad, via Chattanooga, 138 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 17—Seaboard Dispatch:

Boston & Maine railroad, via Northampton, 105 miles.

New York, New Haven & Hartford railroad, via New York, 151 miles.
Pennsylvania railroad, via Delmar, 215 miles.
243 New York, Philadelphia & Norfolk railroad, via Portsmouth, 131 miles.
Seaboard air line, via Atlanta, 595 miles.
Western & Atlantic railroad, via Chattanooga, 138 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 18—Seaboard Dispatch:

Fitchburg railrcad, via Shelburne Falls, 119 miles.
New York, New Haven & Hartford railroad, via New York, 174 miles.
Pennsylvania railroad, via Delmar, 215 miles.
New York, Philadelphia & Norfolk railroad, via Portsmouth, 131 miles.
Seaboard air line, via Atlanta, 595 miles.
Western & Atlantic railroad, via Chattanooga, 138 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 19—Great Southern Dispatch:

New York & New England railroad, via Willimantic, 86 miles.
New York, New Haven & Hartford railroad, via New York, 127 miles.
Pennsylvania railroad, via Harrisburg, 195 miles.
Cumberland Valley railroad, via Hagerstown, 74 miles.
Norfolk & Western railroad, via Bristol, 390 miles.
Southern railway, via Chattanooga, 242 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 20—Great Southern Dispatch:

Boston & Maine railroad, via Northampton, 105 miles.
New York, New Haven & Hartford railroad, via New York, 151 miles.
Pennsylvania railroad, via Harrisburg, 195 miles.
Cumberland Valley railroad, via Hagerstown, 74 miles.
Norfolk & Western railroad, via Bristol, 390 miles.
Southern railway, via Chattanooga, 242 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

244 Route No. 21—Great Southern Dispatch:

Fitchburgh railroad, via Shelburne Falls, 119 miles.
New York, New Haven & Hartford railroad, via New York, 174 miles.
Pennsylvania railroad, via Harrisburg, 195 miles.
Cumberland Valley railroad, via Hagerstown, 74 miles.
Norfolk & Western railroad, via Bristol, 390 miles.
Southern railway, via Chattanooga, 242 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 22—Southern States Dispatch:

New York & New England railroad, via Willimantic, 86 miles.
New York, New Haven & Hartford railroad, via New York, 127 miles.
Lehigh Valley railroad, via Allentown, 93 miles.
Philadelphia & Reading railroad, via Shippensburg, 131 miles.
Western Maryland railroad, via Hagerstown, 46 miles.
Norfolk & Western railroad, via Bristol, 390 miles.
Southern railway, via Chattanooga, 242 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 23—Southern States Dispatch:

Boston & Maine railroad, via Northampton, 105 miles.
New York, New Haven & Hartford railroad, via New York, 161 miles.
Lehigh Valley railroad, via Allentown, 93 miles.
Philadelphia & Reading railroad, via Shippensburg, 131 miles.
Western Maryland railroad, via Hagerstown, 46 miles.
Norfolk & Western railroad, via Bristol, 490 miles.
Southern railway, via Chattanooga, 242 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 24—Southern States Dispatch:

Fitchburgh railroad, via Shelburne Falls, 119 miles.
New York, New Haven & Hartford railroad, via New York, 174 miles.
Lehigh Valley railroad, via Allentown, 93 miles.
245 Philadelphia & Reading railroad, via Shippensburg, 131 miles.
Western Maryland railroad, via Hagerstown, 46 miles.
Norfolk & Western railroad, via Bristol, 390 miles.
Southern railway, via Chattanooga, 242 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 25—Southern States Dispatch:

New York & New England railroad, via Willimantic, 86 miles.
New York, New Haven & Hartford railroad, via New York, 127 miles.
Central Railroad of New Jersey, via Allentown, 90 miles.
Philadelphia & Reading railroad, via Shippensburg, 131 miles.
Western Maryland railroad, via Bristol, 390 miles.
Southern railway, via Chattanooga, 242 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 26—Southern States Dispatch:

Boston & Maine railroad, via Northampton, 105 miles.
New York, New Haven & Hartford railroad, via New York, 151 miles.
Central Railroad of New Jersey, via Allentown, 90 miles.
Philadelphia & Reading railroad, via Shippensburg, 131 miles.

Western Maryland railroad, via Hagerstown, 46 miles.
Norfolk & Western railroad, via Bristol, 390 miles.
Southern railway, via Chattanooga, 242 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 27—Southern States Dispatch:

Fitchburg railroad, via Shelburne Falls, 119 miles.
New York, New Haven & Hartford railroad, via New York, 174 miles.
Central Railroad of New Jersey, via Allentown, 90 miles.
Philadelphia & Reading railroad, via Shippensburg, 131 miles.
Western Maryland railroad, via Hagerstown, 46 miles.
246 Norfolk & Western railroad, via Bristol, 390 miles.
Southern railway, via Chattanooga, 242 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

From New York.

Route No. 28:

Ocean Steamship Company, via Savannah, 250 miles.
Central of Georgia railway, via Atlanta, 294 miles.
Western & Atlantic railway, via Chattanooga, 138 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 29:

Clyde Steamship Co., via Charlestown, 250 miles.
South Carolina & Georgia railroad, via Augusta, 138 miles.
Georgia railway, via Atlanta, 171 miles.
Western & Atlantic railway, via Chattanooga, 138 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 30:

Old Dominion Steamship Company, via Norfolk, 160 miles.
Norfolk & Western railroad, via Bristol, 408 miles.
Southern railway, via Chattanooga, 242 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 31:

Old Dominion Steamship Company, via Portsmouth, 160 miles.
Seaboard air line, via Atlanta, 595 miles.
Western & Atlantic railway, via Chattanooga, 138 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 32:

Old Dominion Steamship Company, via Norfolk, 160 miles.
Southern railway, via Chattanooga, 626 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

247 Route No. 33:

Old Dominion Steamship Company, via Pinner's Point, 160 miles.
Atlantic Coast line, via Denmark, 390 miles.

South Carolina & Georgia railroad, via Augusta, 57 miles.
Western & Atlantic railway, via Chattanooga, 138 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 34—Southern States Dispatch:

Lehigh Valley railroad, via Allentown, 93 miles.
Philadelphia & Reading railroad, via Shippensburg, 131 miles.
Western Maryland railroad, via Hagerstown, 46 miles.
Norfolk & Western railroad, via Bristol, 390 miles.
Southern railway, via Chattanooga, 242 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 35—Southern States Dispatch:

Central Railroad of New Jersey, via Allentown, 90 miles.
Philadelphia & Reading railroad, via Shippensburg, 131 miles.
Western Maryland railroad, via Hagerstown, 46 miles.
Norfolk & Western railroad, via Bristol, 390 miles.
Southern railway, via Chattanooga, 242 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 36—Great Southern Dispatch:

Pennsylvania railroad, via Harrisburg, 195 miles.
Cumberland Valley railroad, via Hagerstown, 74 miles.
Norfolk & Western railroad, via Bristol, 392 miles.
Southern railway, via Chattanooga, 242 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 37—Richmond & Danville Dispatch:

Pennsylvania railroad, via Alexandria, 237 miles.
Southern railway, via Chattanooga, 710 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

248 Route No. 38—Atlantic Coast Dispatch:

Pennsylvania railroad, via Delmar, 215 miles.
New York, Philadelphia & Norfolk, via Pitmer's Point, 131 miles.
Atlantic Coast line, via Denmark, 390 miles.
South Carolina & Georgia railroad, via Augusta, 57 miles.
Georgia railway, via Atlanta, 171 miles.
Western & Atlantic railway, via Chattanooga, 138 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 39:

Central Railroad of New Jersey, via Bound Brook, 31 miles.
Philadelphia & Reading, via Philadelphia, 60 miles.
Baltimore & Ohio railroad, via Alexandria, 144 miles.
Southern railway, via Chattanooga, 710 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Route No. 40—Seaboard Dispatch:

Pennsylvania railroad, via Delmar, 215 miles.
New York, Philadelphia & Norfolk railroad, via Portsmouth, 131 miles.

Seaboard air line, via Atlanta, 595 miles.
Western & Atlantic railway, via Chattanooga, 138 miles.
Nashville, Chattanooga & St. Louis railway, 151 miles.

Q. 12. State each of the carriers that composes each of said routes.

A. The carriers are shown in my answer to the last question.

Q. 13. State the mileage of each of said carriers.

A. That is also shown in the same answer.

Q. 14. State how the through rates from New York and Boston via Chattanooga to Nashville were divided in 1892, between the different carriers composing each of said routes.

A. The divisions in 1892 and 1896 were as follows: (sic)

Q. 15. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to
249 the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. I think these questions and answers have covered the ground quite fully.

Cross-examination.

By Mr. SHAVER:

Q. 1. What relation do you sustain to the Nashville, Chattanooga & St. Louis railway?

A. I am the general freight agent.

Q. 2. Is not the Nashville, Chattanooga & St. Louis railway under the control of the Louisville & Nashville railroad?

A. Not that I know of.

Q. 3. Is it not owned by the Louisville & Nashville railroad?

A. I have no knowledge as to how the stock is owned. I have no access to the stock books, and never have had. All I know about that is general rumor in the newspapers. It is generally supposed that the Louisville & Nashville owns a little over half of the stock of the Nashville, Chattanooga & St. Louis railway, but I have no positive knowledge on that point.

Q. 4. How many roads actually reach Nashville?

A. Two separate and distinct roads, that is different lines of railway.

Q. 5. What are those two roads?

A. The Louisville & Nashville system, and the Nashville, Chattanooga & St. Louis system.

Q. 6. How many roads actually reach Chattanooga?

A. At the present time, the Southern railway, the Nashville, Chattanooga & St. Louis railway, the Chattanooga Southern railway, the Memphis & Charleston railroad. I believe that is all. The Southern railway has various lines reaching Chattanooga, but only one system, including the Chattanooga Southern, which is a short local line. I believe there are only four different systems.

Q. 7. How many different roads under the Southern system reach Chattanooga, and what are they?

A. The East Tennessee division, the Alabama Great Southern division. I should have said five systems, the Cincinnati Southern is one; that is a mixed ownership; the Southern owns half, and the Cincinnati, Hamilton & Dayton owns half. Now to come back to this other question, there is the East Tennessee division, the Alabama Great Southern division, the Georgia division, I think they call it, running from Chattanooga southward through Rome
250 to Atlanta. Now, as I say, the Cincinnati Southern, I understand, is owned jointly by the Southern railway and the Cincinnati, Hamilton & Dayton, half and half. I do not know whether they call that a division of the Southern railway or not.

Q. 8. All the lines or routes which you named in your direct examination from New York and Boston to Nashville are through Chattanooga, are they not?

A. Yes, sir.

Q. 9. Does not the bulk of the traffic from New York and other northeastern cities pass through Chattanooga to Nashville?

A. For a number of years, I believe that is true, but back of that the reverse was true. There was a time when perhaps ninety per cent. of the business reached Nashville through Cincinnati and Louisville and other northern gateways.

Q. 10. How long ago was that the case?

A. Probably from 1865 to the year 1875, or thereabouts. Of course this is just an estimate, I am giving you.

Q. 11. What is the distance from Cincinnati to Chattanooga by the Cincinnati, New Orleans & Texas Pacific railway?

A. 330 miles.

Q. 12. What is the distance from Cincinnati to Nashville by the Louisville & Nashville railroad?

A. 295 miles.

Q. 13. The rates from New York and other northeastern cities to Chattanooga are as follows:

Classes	1	2	3	4	5	6
Cents	114	98	86	73	60	49

are they not?

A. I think those are correct, though I could not say without checking them.

Q. 14. On the haul from New York and other northeastern cities through Chattanooga, 151 miles further on to Nashville, the rates are as follows:

Classes	1	2	3	4	5	6
Cents	91	78	60	42	36	31

are they not?

A. I believe those are correct.

Q. 15. You have stated in your direct examination that these rates to Chattanooga are just and reasonable, in your opinion, I believe?

A. Yes, sir.

Q. 16. Are you also of the opinion that the rates to Nashville are just and reasonable in and of themselves?

A. Well, that is a very broad question, and in order to answer properly, will require quite a lengthy answer.

251 Q. 17. You could answer it yes or no. I simply asked the question, whether the Nashville rates are, in your opinion, reasonable in and of themselves?

A. We would charge more if we could get it up to Nashville.

Q. 18. Then in your opinion they are not just and reasonable, in and of themselves? You would not charge more than just and reasonable rates, would you?

A. No, I would not charge more than a just and reasonable rate.

Q. 19. Do these rates to Nashville pay anything in excess of the cost of service of carriage?

A. Yes, sir. I would like to make my answer to the last question a little longer, if it is allowable, In other words, yes or no does not always give an intelligent answer. One reason why those rates are profitable to the Nashville, Chattanooga & St. Louis railway is that we nearly always have empty cars moving northward. It affords loading for those empty cars. That is the reason it proves more profitable than if moving in the opposite direction, where we seldom have empty cars.

Q. 20. Is a rate, in your opinion, reasonable, which does not yield a carrier a proper remuneration over and above the cost of the service of carriage?

A. No, I do not think it is.

Q. 21. Does not the cost or expense of the service of transportation depend largely or to some extent on the length of the haul, other things being equal?

A. That is one of the factors that enters into the cost, but only one.

Q. 22. Other things being equal, is not the consumption of time greater, the greater the length of the haul?

A. It is.

Q. 23. Other things being equal, is not the consumption of fuel greater, the greater the length of the haul?

A. It is.

Q. 24. Other things being equal, is not the wear and tear on locomotives, cars, tracks, road-beds, etc., greater, the greater the length of the haul?

A. Yes, sir.

Q. 25. Other things being equal is not the cost of keeping the road in repair or in good condition, greater, the greater the length of the road?

A. It is.

Q. 26. Other things being equal, does it not require more locomotives and cars and crews for running trains on a long road, than on a short one?

A. It does.

252 Q. 27. Other things being equal, does not distance add to the cost of building the road, and are not therefore the fixed charges, such as interest on the capital invested greater, the greater the length of the road?

A. Where all things are equal, that is true.

Q. 28. Is not the expense to the carrier of strictly local hauls greater per ton per mile than on long through hauls?

A. It is.

Q. 29. How long have you been engaged in the railroad business in the territory east of the Mississippi and south of the Virginias and the Ohio river?

A. Continuously, since December, 1865.

Q. 30. Has the greater charge for the shorter than the longer haul over the same line in the same direction, the shorter haul being included in the longer, ever to your personal knowledge, been made in that territory except in cases of competition in transportation to the longer-distance point?

A. Well, that word "competition" is a very broad one. Sometimes there is competition of products as well as competition of lines, competition of markets, and letting the word "competition" include all branches of the subject, then I would answer that it has never been made except to meet competition—letting the word "competition" cover all branches of the subject, that is competition of markets, product with product, competition of line and line, and competition of rail with water.

Q. 31. Is there competition of markets without there being also competition in transportation?

A. Yes, sir.

Q. 32. Well, name an instance?

A. We have right on our own line here, two towns, selling the same product competing with each other, shipping over the same road, both being local points. For instance, there is a pipe foundry at South Pittsburg, and another at Bridgeport. Both are local to our line, and both of which compete strongly with each other in selling their pipes to the markets of the country.

Q. 33. Is there any greater charge for the shorter than the longer haul?

A. No, in that case the charge is the same.

Q. 34. I am referring to cases of a greater charge for the shorter haul. Is that greater charge ever made except in the case of competition in transportation, to your personal knowledge?

A. I cannot for the moment call to mind such a case,
253 though I am quite sure there have been such cases. There is a case in point from Nashville to Hickman. There is only one line from Nashville to Hickman, and yet the rates to Hickman are less than the rates to points this side of Hickman; there is only one line; that is competition of market with market. Nashville reaches Hickman, Ky., over the Western division of our road; St. Louis reaches Hickman not only by rail, but also by the Mississippi River boats, at low rates, so that Nashville would be unable to sell any goods in Hickman, and therefore we were forced to make low

rates to Hickman from Nashville. They were made to meet the competition of St. Louis and other markets reaching Hickman by river. We do not make as low rates to the other points this side of Hickman, notwithstanding there is only one road between here and Hickman; no other line from here to Hickman; I never heard of freight going from Nashville to Hickman except over our road.

Q. 35. Is that not a case of competition between your line to Hickman and the lines from St. Louis to Hickman?

A. It is what I call competition of market with market.

Q. 36. Does it not also involve the competition between transportation lines from different markets?

A. Indirectly, it does, yes, that is true. St. Louis has her low rates.

Q. 37. Is not a rate under which traffic will move, and which is not so high as to divert the traffic from other roads or lines, in your opinion, a reasonable rate?

A. Yes, sir, I think it is.

Q. 38. If the rule that there shall be no greater charge for the shorter than a longer haul over the same line in the same direction, the shorter haul being included in the longer, were observed by all the roads or lines from New York and other northeastern cities to Nashville, would it be necessary for any one of those roads or lines to depart from this rule in order to retain its share of the traffic and prevent diversion of its traffic to the other roads or lines?

A. It would; that is, it would be necessary to depart from that rule.

Q. 39. Is not Chattanooga on the Tennessee river?

A. Yes, sir.

Q. 40. Does not Chattanooga, by means of the Tennessee river have water connection with points on the Ohio and Mississippi rivers?

A. It never had any water connection that has been strong enough or has lasted long enough to force the rail rates down.

Q. 41. When you say "has not lasted long enough," do
254 you mean that the river is not navigable the entire year?

A. No, sir; there are so many obstacles to navigation above Riverton that the effort to keep on lines of boats below to Riverton has failed. There is a line of boats running from Chattanooga as far down as Decatur. But when you get down below Decatur to the Mussel Shoals canal, and below that canal, the obstacles in the river as far down as Florence and below Florence to Colbert shoals some thirty miles on down to Riverton, have so far prevented the successful operation of any line of boats from the mouth of the Tennessee river or any point below Riverton to Chattanooga.

Q. 42. There is transportation, you say, the year round from Decatur to Chattanooga?

A. Well, a good portion of the year—perhaps nine or ten months.

Q. 43. What railroads reach Decatur?

A. The Louisville & Nashville and the Memphis & Charleston roads.

Q. 44. Is there not transportation by the Tennessee river from Decatur to the mouth of the river?

A. Irregularly there is; there is no regular line.

Q. 45. Boats then go from Decatur to the mouth of the Tennessee?

A. At high tide, they can get through all right. At low water they cannot.

Q. 46. During how many months of the year is the water so low that the boats cannot navigate the river from Decatur to its mouth?

A. Between Decatur and Florence, occasionally a boat can go through safely, if I understand from talking with river men. Below Florence, possibly there is good water six months in the year.

Q. 47. You have no personal knowledge as to the navigation between Decatur and Florence?

A. No, only from talking with the river men, who are familiar with it. I have personal knowledge of the river below Florence. I have made frequent trips on that portion of the river but have never been between Decatur and Florence.

Redirect examination.

By Mr. BAXTER:

Q. 1. Would it be practicable for the lines operating from New York and Boston via Chattanooga to Nashville to maintain as high rates from New York, Boston and other northeastern cities to Nashville as are charged from New York and other northeastern cities to Chattanooga?

255 A. If they did, they would lose all the business.

Q. 2. You were asked on cross-examination, among others, the following question:

"If the rule, that there shall be no greater charge for a shorter than a longer haul over the same line in the same direction, the shorter haul being included in the longer, were observed by all the roads or lines from New York and other northeastern cities to Nashville, would it be necessary for any one of those roads, or lines, to depart from this rule, in order to retain its share of the traffic, and prevent diversion of its traffic to the other roads or lines"?

Suppose a railroad running from "A" to "B" is 100 miles long, and the competing line from "A" via "C" to "B" is 200 miles long. Suppose that the line A-B would not charge more for the short than the long haul, would it be possible for the A-C-B line to meet the rates by the line A-B, without departing from the rule of charging more for the short than the long haul, unless it should be prepared to accept a great loss upon its local traffic?

A. Ordinarily it would not be possible. But there are some circumstances and conditions attaching to some lines that might make it possible. For instance, the average rates of the lines north of the Ohio river, particularly the trunk lines, are much less per ton

per mile than on the roads in the southeast, on both their local and through traffic. This is due to the enormously greater volume of business and the very much larger population in that territory than in the southeastern territory. If the southeastern roads would undertake to make their rates the same per ton per mile as the roads north of the Ohio, including the trunk lines, none of the southern roads, with their limited volume of tonnage and population could make expenses.

It so happens that in the question of rates from New York and the northeastern coast cities to Nashville this very illustration applies. The established rates from New York and other northeastern cities to Ohio River points—Cincinnati, Louisville, Evansville and Cairo, are made on their established basis, while the rates from New York and other northeastern cities to Chattanooga are made on the established southern basis. Necessarily this northern basis of making rates and this southern basis of making rates, must at some point, or between some points, come together, and by reason of the actual or possible boat rates from the various Ohio River cities to Nashville via the Cumberland river, Nashville is practically controlled by the northern basis of rate-making,
256 and, as stated above, if the southern roads were forced to adjust all their rates to the northern scale, none of them could live.

This break between the southern system of rates and the northern system of rates must cause and inequality somewhere, and as explained above, by reason of the Cumberland river practically making Nashville a trunk-line point, the break comes between the northern and the southern systems between Chattanooga and Nashville. So that in this case, while the long line from New York to Nashville is via the northern routes, they do not only meet the rates of the southern lines without sacrificing their local revenue, but actually force the southern lines to establish a lower basis of rates to Nashville than to Chattanooga.

Q. 3. Recurring to the hypothesis contained in my last question, suppose the local traffic or the local tonnage per mile was the same on the short line A-B as on the long line A-C-B. Now if the long line A-C-B should observe the rule of not charging more for the short than the long haul, and at the same time should attempt to meet the rates of the line A-B, would not the loss of revenue that would have to be sustained by the long line A-C-B be very much greater than the loss of revenue sustained by the line A-B?

A. Yes, sir, very much; in fact, all conditions being equal, it would be twice as great.

Recross-examination.

By Mr. SHAVER:

Q. 1. In the case named to you, the line A-B is the short line, is it not?

A. Yes, sir.

Q. 2. And the line A-C-B, a long, roundabout line?

A. Yes, sir.

Q. 3. Is it not the rule that the short line fixes the rate between two given points?

A. I believe in the passenger business that is the rule; I have heard so stated. But there has never been any such recognized rule in making of freight rates.

Q. 4. Ought not the shortest and best line to fix the rate?

A. Ordinarily, it should do so.

Q. 5. Is it not an unnatural condition of things, when a long, roundabout line, twice as long as the short line, like the line A-C-B, transports traffic between A and B?

A. No, sir, that is frequently done. Much of the business
257 today from New York to Memphis is going via New Orleans, which is twice as long as or very much longer than the short route.

Q. 6. Is that not an unnatural condition of things?

A. It continues right along, and therefore it would seem that that would make it natural. We think it unnatural, because we have the short line, but the Memphis merchants think not, and they tell us that they make the trip from New York to Memphis in from nine to ten days; the shorter line makes it in from five to seven days.

Mr. SHAVER: That is all.

Boston, Mass.

	1	2	3	4	5	6	Dry goods, Boots & shoes.
In effect during 1892	91	78	60	42	36	31	85
In effect during 1896	91	78	60	42	36	31	85

Division basis.

When via routes 19, 20, 21, 22, 23, 24, 25, 26, 27, proportion of the Nash., Chatt. & St. L.	12.5	10.7	8.2	5.8	4.9	4.2	12.5
7, 8, 9, 10, 11, 12, 13, 14, proportion of Nash., Chatt. & St. L. deduct	39	34	27	23	18	15	39

And prorate remainder to Chatt. 80.7 p. c., N., C. & St. L., 19.3 p. c. Tot. p. c., 100.

1 prorate

Str. to Sav.		Chatta.		N., C. & St. L.	
M.	per ct.	M.	p. c.	M.	per ct.
300	34	432	49.9	151	17.1.

First deduct insurance	8, 6, 5, 4, 3, 2.
Wharfage	4, 4, 4, 4, 4, 4.

3 prorate

Str. to Nor.		Bristol.		Chat.		N., C. & St. L.	
M.	p. c.	M.	p. c.	M.	p. c.	M.	p. c.
300	27.2	408	37.1	242	22	151	13.7

First deduct insurance	8, 6, 5, 4, 3, 2.
Total per cent	100

2 prorate

St. to Char.		Aug'ta.		Atlan.		Chat.		N., C. & S. L.	
M.	per ct.	M.	p. c.	M.	p. c.	M.	p. c.	M.	p. c.
250	29.5	138	16.3	171	20.1	138	16.3	151	17.8

Total per cent	100
Arbitraries to N. Y.	16, 15, 14, 12, 12, 10
Wharfage & transfer	5, 5, 5, 5, 5, 5
First deduct insurance	11, 8, 6, 4, 3, 2

4 prorate

Str. to port.		Atlanta.		Chatta.		N., C. & St. L.	
M.	p. c.	M.	p. c.	M.	p. c.	M.	p. c.
300	22.5	595	45.4	138	14.7	151	17.1

Total p. c.	100
Term. & trans.	3, 3, 3, 3, 3, 3
1st ded. ins.	8, 6, 5, 4, 3, 2

5 prorate

Str. to Nor.		Chatta.		N., C. & St. L.	
M.	p. c.	M.	p. c.	M.	per cent.
300	27.2	650	59.1	151	13.7

Total per cent	100
First deduct insurance	8, 6, 5, 4, 3, 2

New York, N. Y.

	1	2	3	4	5	6	Dry goods, Boots & shoes.
	91	78	60	42	36	31	85
	91	78	60	42	36	31	85

When via routes, 34, 35, 36, proportion Nash., Ch. & St. L.	14.3	12.2	9.4	6.6	5.7	4.9	14.3
37, 38, 39, 40, proportion of Nash., C. & St. L., deduct	33	28	25	17	14	12	33

And prorate remainder to Chatt., 80.7 per cent. N., C. & St. L., 19.3 per cent. Total p. c., 100.

28 prorate

Str. to Sav.		Chatt.		N., C. & St. L.	
M.	per ct.	M.	per ct.	M.	per cent.
250	30	452	51.9	151	18.1

First deduct insurance	8, 6, 5, 4, 3, 2
Wharfage	4, 4, 4, 4, 4, 4

29 prorate

St. to Char.		Augusta.		Atlanta.		Chat.		N., C. & St. L.	
M.	p. c.	M.	p. c.	M.	p. c.	M.	p. c.	M.	p. c.
250	29.5	138	16.3	171	20.1	138	16.2	151	17.8

Total	100
Insurance	11, 8, 6, 4, 3, 2
First deduct wharfage	5, 5, 5, 5, 5, 5

30-32 prorate

Str. to Nor.		Chatta.		N., C. & St. L.	
M.	per ct.	M.	per ct.	M.	per cent.
109	16.6	650	67.7	151	15.7

Total per cent	100
Insurance	8, 6, 5, 4, 3, 2
Terminal & light	5, 5, 5, 5, 5, 5

31-33 prorate

St. to Port.		Atlanta.		Chatta.		N., C. & St. L.	
M.	p. c.	M.	p. c.	M.	p. c.	M.	p. c.
160	16.6	595	53	138	12.3	151	18.1

Total p. c.	100
Insurance	8, 6, 5, 4, 3, 2
1st ded., N. Y. Ter. & L.	5, 5, 5, 5, 5, 5

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259 NASHVILLE, TENN., *July* 22, 1897.

GEORGE P. BILES, a witness on behalf of the defendant, having been duly sworn, testified as follows:

By Mr. BAXTER:

Q. 1. State your name, age, residence and occupation.

A. George P. Biles; age, 40; occupation, general freight agent of the Cincinnati, New Orleans & Texas Pacific Railway Company; residence, Newport, Kentucky.

Q. 2. How long have you been connected with the railroad transportation business in the United States and in what capacities?

A. Since 1884 in various capacities, such as rate clerk, afterwards assistant general freight agent, and since October, 1895, general freight agent.

Q. 3. The rates from New York via Bristol to Chattanooga were in 1892, as shown by the report and opinion of the commission as follows:

Classes	1	2	3	4	5	6
Cents	114	98	86	73	60	49

The distance from New York via Bristol to Chattanooga is 901 miles. Please state whether, in your opinion, said rates are just or unjust, reasonable or unreasonable, and give your reasons, for any opinion you may express upon the subject.

A. I consider the rates from New York to Chattanooga just and reasonable within themselves. This opinion is given based upon the fact that the rates from New York to Chattanooga are adjusted in line with the rates from New York and other competitive points in that section of the country.

Q. 4. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. I do not think there is anything further I can say in regard to this.

Cross-examination.

By Mr. SHAVER:

Q. 1. You have stated that the rates from Chattanooga to New York and Boston and other eastern cities are just and reasonable in and of themselves. The rates for the haul from New York
260 and other eastern cities through Chattanooga and 151 miles further on to Nashville, are as follows:

Classes	1	2	3	4	5	6
Cents	91	78	60	42	36	31

Is it your opinion that those rates to Nashville for the haul through Chattanooga and 151 miles further on, are also just and reasonable in and of themselves?

A. I think they are. The rates from the East to Nashville are unreasonably low.

Q. 2. Do those rates yield to the carrier revenue in excess of the cost of transportation?

A. I think the lines from the East through Chattanooga to Nashville can afford to participate in the movement of traffic from and to those points at those rates.

Q. 3. Do they yield the carrier anything in excess of the cost of transportation?

A. That depends entirely upon the circumstances. I do not know what would be the cost of the service for handling business from the East to Nashville. That is a very difficult thing to get at. But those lines certainly get revenue out of the Nashville business which, in my opinion, exceed the cost of the service performed.

Q. 4. Is a rate in your opinion reasonable in and of itself which does not yield a carrier a proper remuneration over and above the cost of the service of the carriage?

A. I should say not.

Q. 5. Can it be ascertained whether a rate is reasonably remunerative to the carrier without first considering the cost of the expense of the service of carriage?

A. That is a very hard matter to determine. It is a very difficult matter to decide or to fix your rate as compared with the cost of service of operation. There are so many conditions surrounding this rate situation in regard to that, that is a very difficult thing to form.

Q. 6. Can it be ascertained whether a rate yields to the carrier an income over and above the cost of the service of carriage without first ascertaining the cost of that service?

A. I think myself that that depends somewhat upon experience. If a new railroad is opened up, it has to fix its rates, we will say to local points, to enable that carrier to meet the cost of the operation. Now, the cost of operation has not been fixed, so therefore, the rates will have to be fixed by the management as they feel will bring about the desired result—I mean from a revenue standpoint,
261 and which would meet all the expenses. On the other hand, again, those rates may not be high enough to meet these expenses.

Q. 7. Does not the cost of the expense of the service of transportation depend largely, or to some extent on the length of the haul, other things being equal?

A. If you mean by that question, if freight can be handled for a longer distance for a less rate per ton per mile——

Q. 8. I did not refer to the rate per ton per mile.

A. You referred to the distance, I understand.

Q. 9. I will read the question again. (Counsel here repeated the question.)

A. I would like for you to explain that to me—what you mean by that.

Q. 10. Well, all other things being equal, and the rate of speed being the same, the length of the train being the same, the quantity

of the cars being the same, &c., would it not cost more to transport the train 20 miles than 10?

A. It would probably cost more in the aggregate.

Q. 11. That is what I mean, in the aggregate, I do not refer to the cost per mile.

A. It will cost more to run a train of twenty cars three hundred miles than a train of twenty cars fifty miles.

Q. 12. Other things being equal, is not the consumption of time greater, the greater the length of the haul?

A. Of course, it takes longer for a train to go a hundred miles at the rate of fifty miles per hour, than it does to go fifty miles, sir.

Q. 13. Other things being equal, is not the consumption of fuel greater, the greater the length of the haul?

A. Yes, sir.

Q. 14. Other things being equal, is not the wear and tear on locomotives, cars, tracks, etc., greater, the greater the length of the haul?

A. Yes, sir.

Q. 15. Other things being equal is not the cost of keeping the road in repair or in good condition greater, the greater the length of the road?

A. Yes, sir.

Q. 16. Does it not require more locomotives and cars and crews for running trains on a long road than on a shorter road?

A. Do you mean the aggregate or do you mean as compared with the distance? If you mean in the aggregate, I suppose it will cost more for the longer road than a shorter road.

Q. 17. I asked, does it not require more locomotives and cars and crews for running trains on a long road, than on a short one?

262 A. Yes, sir.

Q. 18. Other things being equal, does not distance add to the cost of building a road, and are not, therefore, the fixed charges, such as interest on capital invested, greater, the greater the length of the road?

A. Yes, sir.

Q. 19. Is not the expense to the carrier on strictly local hauls greater per ton per mile than on long through hauls?

A. Yes, sir, I should say so.

Q. 20. How long have you been engaged in the railroad business in the territory east of the Mississippi and south of the Virginias and Ohio river?

A. Since 1884.

Q. 20½. Has the greater charge for the shorter than the longer haul over the same line in the same direction, the shorter haul being included in the longer, ever, to your personal knowledge been made in that territory except in cases of competition in transportation to the longer-distance point?

A. I do not know that I do.

Q. 21. Is the traffic transported from New York and other northeastern cities via Cincinnati and thence over the Cincinnati and New Orleans and Texas Pacific Railroad Company to Chattanooga?

A. Yes, sir.

Q. 22. Are the rates on traffic transported by that line to Chattanooga the same as by the lines through Bristol, etc.?

A. The rates are supposed to be the same by both routes.

Q. 23. Does the line via Cincinnati and thence over the Cincinnati, New Orleans and Texas Pacific railway to Chattanooga compare with the other lines to Bristol, &c.?

A. To Chattanooga?

Q. 24. Yes, sir.

A. Yes, sir.

Q. 25. Is not the bulk of the traffic from New York and other eastern cities to Nashville hauled by the route through Chattanooga?

A. I cannot say as to that.

Q. 26. What roads actually reach Nashville?

A. The Nashville, Chattanooga & St. Louis railway and the Louisville & Nashville railroad.

Q. 27. Is not the Nashville, Chattanooga & St. Louis railway owned or controlled by the Louisville & Nashville Railroad Company?

A. I cannot say. I do not know.

Q. 28. Is it not your understanding that they are practically one system?

263 A. So far as I know they are separate organizations—at least they are operated independently—separate management for each road. How far the Louisville & Nashville railroad is interested to any extent in the Nashville, Chattanooga & St. Louis railway properties, I do not know.

Q. 29. Is it not your understanding that the Louisville & Nashville railroad system owns a controlling interest in the Nashville, Chattanooga & St. Louis railway?

A. It has been claimed that such is the case, but I do not really know. I am not in a position to say.

Q. 30. Name the railroads that actually reach Chattanooga.

A. There is:

The Cincinnati, New Orleans & Texas Pacific railway.
The Southern railway.
The Western & Atlantic railroad.
The Chattanooga, Rome & Columbus railroad.
The Chattanooga Southern railroad.
The Alabama Great Southern railroad.
The Nashville, Chattanooga & St. Louis railway.
The Memphis & Charleston railroad.

I, Frank Lyon, who was agreed upon by counsel for both parties, to act as special examiner, as set forth in their foregoing stipulation, do hereby certify that I faithfully and truly and correctly took the testimony of the above-named witnesses in shorthand, and afterwards reduced it to typewriting, and that the foregoing pages con-

tain a full, true and correct report of the testimony given by each of said witnesses.

This 4th day of August, 1897.

FRANK LYON,
Acting Special Examiner,
1317 *F St. N. W., Washington, D. C.*

EXHIBIT No. 3. Filed by J. M. Culp.

The Southeastern Freight Association.

Articles of Association of the Southeastern Freight Association.

Preamble.

For the purpose of interchanging authentic information in
264 regard to the tariffs of the respective parties, members of this association; for consultation and mutual advice in regard to the reasonableness of tariffs, and the publicity of the same; and to aid in fulfilling the purposes of the laws of the States, and of the United States, affecting commerce; especially with a view of preventing illegal and unjust discriminations between persons and localities, or kinds of traffic.

The Atlanta & West Point railroad and Western Railway of Alabama, the Central of Georgia railway, the Georgia Southern & Florida railway, the Southern railway, the Merchants' & Miners' Transportation Company, the Ocean Steamship Company, the Atlantic Coast line, the Old Dominion Steamship Company, the Atlanta, Knoxville & Northern railway, the Florida Central & Peninsular railroad, the Baltimore, Chesapeake & Richmond Steamboat Company, the Plant system, the Georgia railroad, the East & West railroad, the Norfolk & Western railway, and such other lines as may become parties hereto, hereby agree to form an association to be called the Southeastern Freight Association.

Article I.

SECTION 1. The territory of this association shall be the territory lying south of the Potomac river to the Virginia-West Virginia State line, thence via said line to Bristol, Tenn., through and including Middlesborough, Ky., Jellico and Harriman Junction, Tenn., to and including Chattanooga, Tenn., and on and south and east of a line from Chattanooga, Tenn., via the Alabama Great Southern railroad to Birmingham, Ala., thence via Southern railway to and including Selma, Ala., thence via the Western Railway of Alabama to and including Montgomery, Ala., thence via Plant system via Valdosta, Ga., Jasper, Live Oak and Lake City, Fla., to Jacksonville, Fla., including points on the line from Montgomery to Jacksonville; thence via the South Atlantic seaboard to the Potomac river.

SECTION 2. The traffic subject to this association shall be all business for which two or more parties hereto compete, having origin or destination within this territory.

SECTION 3. It is understood that the following traffic is not covered by this association: (1) Traffic between any two points north of the Virginia-North Carolina State line; (2) traffic between points on the designated northern and western boundary lines and points outside of the defined association territory; (3) local traffic from or through North Atlantic ports to South Atlantic ports, or
265 from South Atlantic ports to or through North Atlantic ports; and (4) coke and bituminous coal.

Article II.

SECTION 1. The association shall be managed by an executive board, which shall have no power to bind the members of the association to observe any regulations in restraint of trade.

Article III.

SECTION 1. The presidents, vice-presidents or general managers of the companies members of the association shall constitute the executive board, but may designate another officer, fully empowered to represent them thereon.

SECTION 2. The executive board shall elect its chairman and the chairman of this association, and shall fix his term of service, and shall fix the salaries of the chairman and officers. All other expenses of the association shall be subject to its review and approval.

SECTION 3. The executive board or the conference committee shall meet upon the written request of three or more members thereof, or upon call of the chairman.

SECTION 4. Two-thirds of the members of the executive board shall constitute a quorum.

SECTION 5. It shall require the unanimous action of those present to adopt any proposition coming before the executive board.

Article IV.

SECTION 1. A conference committee shall be constituted, consisting of a duly accredited traffic officer of each company. Each company party hereto reserving always to itself the right to take independent action on any subject, agrees that any change in rates, rules or regulations affecting the traffic within the territory of this association, proposed to be made by any company, shall be submitted to said conference committee by the company proposing to make such change for consideration and exchange of views, at least three days before the same shall take effect.

Article V.

SECTION 1. It shall be the duty of the chairman to discourage a reduction in rates by rebate or drawback or by payment of commissions or by underbilling weights, or by an illegal device whatsoever,
266 and upon complaint that such practices are being resorted to, shall make an investigation thereof, reporting the result to the executive board. The chairman and his representa-

tives shall be given access to all records of the companies that pertain to the traffic subject to this association.

Article VI.

SECTION 1. The association expenses shall be apportioned fairly between the companies by the executive board, and upon such basis, the chairman shall have authority to make draft upon such companies monthly, in advance, to meet the expenses of the association.

Article VII.

SECTION 1. Any party retiring from this association before the expiration of the time herein fixed, except by unanimous consent, shall not be released from its obligations to contribute its *pro rata* share towards the expense of maintaining the association during the time agreed upon.

Article VIII.

SECTION 1. It shall be the duty of the chairman to preside at all meetings of the conference committee, keep the records of the association, including the records of the executive board, to receive from the members of the association copies of any joint tariff or rate established by said members covering traffic within the territory of the association, either wholly or in part, and to compile, print and distribute such tariffs in conformity with the interstate-commerce act and other laws; and to receive, formulate and distribute statistical information as to the freight traffic of all lines. To this end, members will furnish such reports of freight traffic within the territory of the association as may be required by the chairman.

SECTION 2. The rules governing the filing of freight tariffs with the Interstate Commerce Commission shall apply as to filing all tariffs with the chairman, and the parties hereto shall file with the chairman all tariffs they may issue.

Article IX.

SECTION 1. Nothing herein shall be so construed as to establish or otherwise affect rates on freight traffic, and it shall be the duty of the executive board to so exercise the power conferred upon it as to discourage, and, so far as possible, prevent, a violation of the interstate-commerce act, and of any other Federal or State law, applicable to commerce, or to the provisions of the charters of
267 any of the parties hereto. The executive board shall report to the Federal and State commissions any reduction in rates by any illegal device whatsoever, in order to prevent unjust discriminations between persons and localities or kinds of traffic.

Article X.

SECTION 1. No change shall be made in these articles of association, except by consent of each member of the executive board.

Article XI.

SECTION 1. These articles of association shall become effective May 1st, 1897, and continue in force until May 1st, 1898.

THE CENTRAL OF GEORGIA RAILWAY,
By JOHN M. EGAN, *Vice-President.*
THE OCEAN STEAMSHIP CO.,
By JOHN M. EGAN, *Vice-President.*
MERCHANTS' AND MINERS' TRANS. CO.,
By J. C. WHITNEY, *Traff. Mgr.*
ATLANTA, KNOXVILLE & NORTHERN R'Y CO.,
By E. C. SPALDING, *Vice-President.*
SOUTHERN R'W'Y CO.,
By W. W. FINLEY, *2d V. P.*
GEORGIA SOUTHERN & FLORIDA RAILWAY CO.,
By WILLIAM CHECKLEY SHAW, *Vice-President.*
EAST & WEST RAILROAD CO.,
By CHARLES P. BALL, *Gen'l Manager.*
THE BALTIMORE, CHESAPEAKE AND RICHMOND ST. B'T CO.,
By REUBEN FOSTER, *President.*
PLANT SYSTEM,
By D. F. JACK, *3d V. P.*
THE GEORGIA RAILROAD CO.,
By THOMAS K. SCOTT, *Gen. Mgr.*
THE ATLANTIC COAST LINE,
By H. WALTERS, *President.*
THE ATLANTA & WEST POINT RAILROAD CO. AND
THE WESTERN RAILWAY OF ALABAMA,
By GEORGE C. SMITH, *Pres't and Gen'l Mgr.*

EXHIBIT No. 1. Filed by Vanden Burg. Sup. 10.

Statement Showing Classes of Freight (Official Classification) and Commodities Separate Shipped from Boston and New York via Cincinnati, O., to Nashville, Tenn., During the Months of May and November, 1892; also Showing Number of Tons Carried 1 Mile for Each Class and Commodity.

Classification.	May, 1892.						November, 1892.					
	From New York, N. Y.		From Boston, Mass.		Total.		From New York, N. Y.		From Boston, Mass.		Total.	
	Weight in pounds.	Tons carried 1 mile.	Weight in pounds.	Tons carried 1 mile.	Weight in pounds.	Tons carried 1 mile.	Weight in pounds.	Tons carried 1 mile.	Weight in pounds.	Tons carried 1 mile.	Weight in pounds.	Tons carried 1 mile.
Class 1	14,713	2,155	.....	.....	14,713	2,155	22,767	3,335	.....	.....	22,767	3,335
" 2	2,048	300	.....	.....	2,048	300	4,190	614	180	026	4,370	640
" 3	4,555	667	100	014	4,655	681	9,995	1,464	2,000	293	11,995	1,757
" 4	.....	.....	6,750	989	6,750	989	13,774	2,018	350	051	14,124	2,069
Coffee	149,305	21,873	.....	.....	149,305	21,873	50,150	7,347	.....	.....	50,150	7,347
Apples	.....	.....	.....	.....	.....	.....	28,500	4,175	.....	.....	28,500	4,175
Bunch	.....	.....	24,000	3,516	24,000	3,516	.....	.....	.....	.....	.....	.....
Total	170,621	24,995	30,850	4,519	201,471	29,514	129,376	18,953	2,530	370	131,906	19,323

To Mr. Y. Vandenburg, traffic manager, Cincinnati to Nashville, 293 miles:
I hereby certify above statement to be correct.
Louisville, Ky., June 14th, 1897.

W. M. DICKINSON, *Auditor of Receipts.*

EXHIBIT No. 2. Filed by Vanden Burg. Sup. 12.
Louisville & Nashville Railroad Company, office of the general freight agent.
Rates of Transportation Taking Effect ——.

Form 1046.

From New York, N. Y., to—	Cotton piece goods.	Canned goods N. O. S.	Soda C. L. in and any quantity out.	Apples C. L. in and L. C. L. out.	Groceries and sadddlery N. O. S.	Coffee, green, in double s'ks L. C. L.	Leather in bdls. or rolls.	Lemons. C. L. in and L. C. L. out.	
Stevenson, Ala., on Nashv. combination	1 00	1 13	72	50	1 36	67	1 18	1 05	
" " " Chatta. "	82	76	68	45	1 23	67	1 08	63	
Bridgeport, Ala., on Nashv. comb'n	1 00	1 13	72	50	1 36	67	1 18	1 05	
" " " Chatta. "	77	72	64	42	1 19	63	1 03	59	
Decherd, Tenn., on Nashv. comb'n	94	1 00	**70**	50	**1 38**	**67**	**1 12**	97	N. & C. stations.
" " " Chatta. "	91	84	75	47	1 32	73	1 17	72	
Tullahoma, Tenn., on Nashv. comb'n	**90**	1 06	**68**	50	**1 24**	**66**	**1 08**	93	
" " " Chatta. "	95	88	78	47	1 36	76	1 21	76	
Scottsboro, Ala., on Nashv. comb'n	90	1 13	72	61	1 36	67	1 18	1 05	
" " " Chatta. "	81	82	70	51	1 34	67	1 17	74	
Woodville, Ala., on Nashv. comb'n	90	1 13	72	61	1 36	**67**	**1 18**	1 05	M. & C. sta's.
" " " Chatta. "	83	84	72	52	1 36	68	1 19	76	
Cleveland, Tenn., on Nashv. comb'n	98	1 21	80	65	1 50	71	1 32	1 19	
" " " Chatta. "	76	74	65	45	1 22	61	1 08	62	Sou. R'y sta's.
Athens, Tenn., on Nashv. comb'n	1 04	1 27	86	69	1 58	75	1 38	1 27	East of Chatta.
" " " Chatta. "	82	80	71	49	1 30	65	1 14	70	
Valley Head, Ala., on Nashv. comb'n	88	1 10	70	57½	1 28½	63½	1 18	1 07½	
" " " Chatta. "	78	76	67	47½	1 28	63½	1 11	68	
Fort Payne, Ala., on Nash. comb'n	91	1 13½	73	60	1 44	**66**	1 22	1 13	A. G. S. sta's.
" " " Chatta. "	84	82	73	52½	1 38	68½	1 19	78	
Jamestown, Ala., on Nashv. comb'n	1 01	1 17	83	67	1 59	73	1 37	1 28	
" " " Chatta. "	88	87	77	50	1 33	66	1 17	73	
Harrisburg, Ala., on Nashv. comb'n	1 02	1 18	84	69	1 58	75	1 40	1 27	Chatta. Sou. sta's
" " " Chatta. "	86	80	75	49	1 30	65	1 16	70	
La Fayette, Ga., on Nashv. comb'n	98	1 13	80	67	1 51	73	1 33	1 20	
" " " Chatta. "	76	76	65	47	1 23	63	1 09	63	
Summerville, Ga., on Nashv. comb'n	1 03	1 19	85	69	1 59	75	1 40	1 28	C. R. & C. sta's.
" " " Chatta. "	81	82	70	49	1 31	65	1 16	71	
Cohutta, Ga., on Nashv. comb'n	98	1 13	80	65	1 51	73	1 33	1 15	
" " " Chatta. "	76	76	65	45	1 23	63	1 02	58	Sou. R'y sta's.
Waring, Ga., on Nashv. comb'n	1 01	1 17	83	66	1 55	74	1 36	1 19	South Chatta.
" " " Chatta. "	79	80	68	46	1 27	64	1 12	62	
Resaca, Ga., on Nashv. comb'n	1 01	1 16	83	67	1 55	73	1 36	1 18	
" " " Chatta. "	86	79	68	47	1 27	65	1 12	61	
Adairsville, Ga., on Nashv. comb'n	1 08	1 19	90	68	1 59	74	1 39	1 21	W. & A. sta's.
" " " Chatta. "	89	82	69	48	1 31	64	1 15	64	
Dayton, Tenn., on Nashv. comb'n	93	1 08	75	63	1 48	69	1 29	1 17	
" " " Chatta. "	71	71	60	43	1 20	59	1 05	60	
Spring City, Tenn., on Nashv. comb'n	95	1 08	77	63	1 50	69	1 31	1 19	C., N. O. & T. P.
" " " Chatta. "	73	71	62	43	1 22	59	1 07	62	

Lowest combination under on Nashville only when rates are in bolder type.

THE INTERSTATE COMMERCE COMMISSION. 223
2020

270 And on the same day, to wit, the 26th day of August, A. D. 1897, a certain stipulation was filed in the clerk's office of said court, which said stipulation is clothed in the words and figures following, to wit:

Stipulation.

(Endorsed:) Filed Aug. 26th, 1897. Henry O. Ewing, Clerk.

In the Circuit Court of the United States for the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY Company *et al.*
} In Equity. No. 384.

Stipulation.

In the above-entitled cause it is stipulated and agreed, by counsel for the complainant and by counsel for the defendants, that the depositions of the following-named witness for the complainant, to wit, Jesse M. Smith, of Washington, D. C., may be taken on the foregoing and annexed direct and cross interrogatories, and may be read in evidence on the hearing of said cause subject to all exceptions as to relevancy and competency. All formal objections are waived. It is further stipulated and agreed that Eugene L. Gaddess, of Washington, D. C., may act as commissioner in taking said deposition. The issuance of commission to him and formal caption and certificate by him are waived.

L. A. SHAVER,
Counsel for the Interstate Commerce Commission.
ED. BAXTER,
Counsel for the Defendants.

And afterwards, to wit, on the 27th day of August, A. D. 1897, the deposition of Jesse M. Smith was filed in the clerk's office of said court, which said deposition is clothed in the words and figures following, to wit:

Deposition of Jesse M. Smith.

(Endorsed:) Filed Aug. 27, 1897. Crawford T. Johnson, Deputy Clerk.

271 In the Circuit Court of the United States for the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA & Georgia Railway Company *et al.* } In Equity. No. 384.

Interrogatories in the above-entitled cause on behalf of the complainant therein, to be exhibited to Jesse M. Smith, of Washington, D. C.

Interrogatory No. 1. What is your name, residence, and occupation?

Interrogatory No. 2. If you say you are auditor of the Interstate Commerce Commission, state how long you have occupied that position and what, if any, was your previous position with the commission and how long you occupied that?

Interrogatory No. 3. In what business were you engaged before entering into the service of the commission? How long were you so engaged and in what part of the country?

Interrogatory No. 4. Are schedules of rates, fares, and charges applying on interstate traffic required to be filed by carriers with the Interstate Commerce Commission? Are they not filed in the office of the auditor of the commission, and is it not one of your duties as auditor to examine such tariffs?

Interrogatory No. 5. From your examination of such schedules of rates, fares, and charges, in what section of the United States does the practice of making the greater charge for the shorter than the longer haul over the same line in the same direction, the shorter haul being included in the longer, prevail to the greatest extent?

Interrogatory No. 6. If you say that this practice prevails to the greatest extent in the territory east of the Mississippi river and south of the Ohio and Potomac rivers, state whether or not it is the rule in that territory in cases of transportation from points outside that territory, through shorter-distance local points to longer-distance competitive points in that territory.

Interrogatory No. 7. How long has this practice existed in that territory? Was it or not in existence in the year 1887, when the act to regulate commerce became a law and prior thereto?

272 Interrogatory No. 8. Does this practice exist to any considerable extent in eastern or trunk-line territory?

Interrogatory No. 9. Has the greater charge for the shorter than the long- over the same line in the same direction, the shorter haul being included in the longer, ever to your personal knowledge been made in the territory east of the Mississippi river and south of the

Ohio and Potomac rivers, except in cases of competition in transportation to the longer-distance point? In other words, so far as your personal knowledge extends, has not competition in transportation been the sole ground or excuse for such greater charge?

Interrogatory No. 10. Give a tabular statement showing the rates on the six classes of traffic that were in force in 1892 and that are now in force from New York and Boston to Chattanooga and Nashville, respectively, and showing the excess of the Chattanooga rate on each class over the Nashville rate.

Interrogatory No. 11. State under what classifications these rates are made and name a few principal articles covered by each class.

Interrogatory No. 12. What are the minimum car-load weights specified in these classifications, and what is the excess of the Chattanooga rate over the Nashville rate on each class of traffic per such minimum car-loads?

Interrogatory No. 13. Are the same articles classified differently in the two classifications to any considerable extent, and if so, can you state which, as a whole is the lower—that is, which contains the greater number of articles classed lower than the other?

Interrogatory No. 14. Mention, if you can, a few articles which are placed in a lower class in the official than in the southern classification, and state the class rates on such articles from New York to Chattanooga and Nashville, according to the classification governing the rates to each point; also the difference, if any, in favor of Nashville.

Interrogatory No. 15. Mention, if you can, a few articles which are classed lower in the southern than in the official classification, and state the class rates on such articles from New York to Chattanooga and Nashville according to the classification governing the rates to each point; also state the difference in rate, if any, in favor of Nashville.

Interrogatory No. 16. Are there any important articles that are given special commodity rates from New York to Nashville and not to Chattanooga? If so, name such articles and the rates applying thereon to both points.

273 Interrogatory No. 17. What is the distance by the short rail line from Chattanooga to Memphis and from Nashville to Memphis; also from Chattanooga to Charleston and Savannah? Name the short rail lines from New York and Boston to Chattanooga and Nashville respectively, and state the distances by those lines to Chattanooga and Nashville respectively?

Interrogatory No. 18. Name the roads that actually reach Nashville; also the roads that actually reach Chattanooga.

Interrogatory No. 19. Cannot as many practicable lines of transportation be formed from Boston and New York to Chattanooga as to Nashville? Cannot a larger number of practicable lines of transportation be formed from Boston and New York to Chattanooga than to Nashville?

Interrogatory No. 20. Was not Chattanooga in 1892, and has it not been both before and since that time, recognized as what is known as a competitive point? Was not it so recognized and

treated by the Southern Railway & Steamship Association during its existence?

Interrogatory No. 21. What are the distances via the Nashville, Chattanooga & St. Louis railway from Chattanooga to Stevenson, Bridgeport, Decherd and Tullahoma? What are the distances by the same road from Nashville to these points?

Interrogatory No. 22. What are the distances via the Memphis & Charleston railroad from Chattanooga to Scottsboro and Woodville, Ala.? What are the distances by the shortest line from Nashville to these points?

Interrogatory No. 23. What are the distances from Chattanooga by the shortest line to Cleveland and Athens, Tenn., stations on the Southern railway? What are the distances by the shortest line from Nashville to the same points?

Interrogatory No. 24. What are the distances by the shortest line from Chattanooga to Valley Head and Fort Payne, stations on the Alabama Great Southern road? What are the distances by the shortest line from Nashville to the same points?

Interrogatory No. 25. What are the distances by the short line from Chattanooga to Jamestown and Harrisburg, Ala., stations on the Chattanooga Southern road? What are the distances by the short line from Nashville to the same points?

Interrogatory No. 26. What are the distances by the short line from Chattanooga to Lafayette and Summerville, Ga., stations
274 on the Chattanooga, Rome & Columbus road? What are the distances by the short line from Nashville to the same points?

Interrogatory No. 27. What are the distances by the short line from Chattanooga to Cohutta and Waring, Ga., Southern railway stations south of Chattanooga? What are the distances by the short line from Nashville to the same points?

Interrogatory No. 28. What are the distances by the short line from Chattanooga to Resaca and Adairsville, Ga., stations on the Western & Atlantic road? What are the distances by the short line from Nashville to the same points?

Interrogatory No. 29. What are the distances by the short line from Chattanooga to Dayton and Spring City, Tenn., stations on the Cincinnati, New Orleans & Texas Pacific railway? What are the distances by the short line from Nashville to the same points?

Interrogatory No. 30. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

L. A. SHAVER,
Of Counsel for Complainant.

Cross-examination waived.

ED. BAXTER,
Counsel for Defendants.

In the Circuit Court of the United States for the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA & GEORGIA Railway Company *et al.* } In Equity. No. 384.

Stipulation.

In the above-entitled cause, it is stipulated and agreed, by counsel for the complainant and by counsel for the defendants, that the deposition of the following-named witness for the complain-
275 ant, to wit: Jesse M. Smith, of Washington, D. C., may be taken on the foregoing and annexed direct and cross interrogatories, and may be read in evidence on the hearing of said cause subject to all exceptions as to relevancy and competency. All formal objections waived. It is further stipulated and agreed that Eugene L. Gaddess, of Washington, D. C., may act as commissioner in taking said deposition. The issuance of commission to him and formal caption and certificate by him are waived.

L. A. SHAVER,
Counsel for the Interstate Commerce Commission.
ED. BAXTER,
Counsel for the Defendants.

In the Circuit Court of the United States for the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA & GEORGIA Railway Company *et al.* } In Equity. No. 384.

Deposition of Jesse M. Smith, a Witness for the Complainant.

The said witness, JESSE M. SMITH, having been by me first duly sworn to speak the truth, the whole truth and nothing but the truth, doth depose as follows:

To the 1st interrogatory he saith: My name is Jesse M. Smith, Washington, D. C., and I am auditor of the Interstate Commerce Commission.

To the 2nd interrogatory he saith: I have occupied that position since July 1, 1895; from January 1, 1888, to July 1, 1895, I was assistant auditor of the commission.

To the 3d interrogatory he saith: I was engaged in railroad work for about fourteen years prior to entering the service of the commission, most of the time in the general freight department of the Louisville & Nashville railroad, at Louisville, Ky., and Montgomery, Ala.

To the 4th interrogatory, he saith: Common carriers are required

to file with the commission all schedules of rates, fares and charges applying on interstate traffic. All of such schedules are
276 placed on file in the office of the auditor of the commission, and it is one of the duties of the auditor, with the assistance of the clerical force in his charge, to examine, as far as practicable all schedules of rates, fares and charges filed in compliance with section six of the act to regulate commerce, for the purpose of determining whether such schedules are in accordance with the requirements of the law and the orders of the commission.

To the 5th interrogatory he saith: From the large number of tariffs examined since the beginning of my service with the commission, applying in all sections of the country, I am of the opinion that the practice of making the greater charge for the shorter than for the longer haul, over the same line in the same direction, the shorter being included in the longer, prevails to the greatest extent in the territory east of the Mississippi river and south of the Ohio and Potomac rivers.

To the 6th interrogatory, he saith: I am of the opinion that the practice referred to prevails as a rule in cases of transportation from points outside that territory through shorter-distance local points to longer-distance competitive points in that territory, though there are no doubt some exceptions.

To the 7th interrogatory he saith: To the best of my recollection this practice has existed in that territory to a greater or less extent since the beginning of my railroad service. It was in existence in the year 1887, and as above indicated, prior thereto.

To the 8th interrogatory, he saith: This practice does not prevail to any considerable extent in the territory east of the Mississippi river and north of the Ohio and Potomac rivers.

To the 9th interrogatory, he saith: I have no personal knowledge of any case where the greater charge for the shorter than for the longer haul, over the same line in the same direction, the shorter being included in the longer, has been made in the territory described, except in cases where competition in transportation existed at the longer-distance point. I believe the lower charge to the longer-distance point has, in practically all cases, been made on the ground of competition in transportation to such longer-distance point, either direct competition in transportation from and to the same points, or competition with carriers operating from other markets to same point of destination.

To the 10th interrogatory he saith: The rates on the six classes of freight from New York and Boston to both Chattanooga
277 and Nashville that were in force in 1892, are the same as those in effect at the present time, and are as follows, in cents per hundred pounds:

To Chattanooga, Tennessee:

	1	2	3	4	5	6
1892–1897	114	98	86	73	60	49

To Nashville, Tennessee:

	91	78	60	42	36	31

The rates to Chattanooga are in excess of the rates to Nashville on each class as follows:

1	2	3	4	5	6
23	20	26	31	24	18

To the 11th interrogatory, he saith: The rates to Chattanooga are governed by the southern freight classification. The rates to Nashville are governed by the official classification. A few of the principal articles in each class of these classifications are as follows:

Southern Freight Classification.

1st class:

Dry goods, N. O. S.; boots and shoes, tobacco, drugs and medicines, N. O. S.; rubber goods, N. O. S.; musical instruments, N. O. S.

2nd class:

Saddlery, N. O. S.; glassware, common, N. O. S.; hardware, N. O. S., boxed; matting, N. O. S.; mills, N. O. S.; tinware, N. O. S.

3rd class:

Cordage and twine, machinery and machines, N. O. S., L. C. L.; stoves, N. O. S.; stove furniture and hollow-ware, L. C. L.; Bicycles, K. D., C. L.; wire, N. O. S.; leather in rolls or boxes, L. C. L.

4th class:

Rope, N. O. S., L. C. L.
Canned goods, N. O. S., L. C. L.
Coffee, green, single sacks.
Dye, liquid, N. O. S., in barrels.
Handles, N. O. S., boxed or crated, L. C. L.
Cotton-seed oil mills.

278 5th class:

Cotton piece goods.
Rope, wire, L. C. L.; Canned goods, N. O. S., C. L.; stoves, N. O. S.; stove plates, stove furniture and hollow-ware, C. L.; tin plate, in boxes, L. C. L.; roofing felt, in bundles or rolls; Babbitt metal, in boxes, barrels or casks.

6th class:

Rope, N. O. S., C. L.; cement, N. O. S., in barrels or sacks, L. C. L.; Coffee, green, in double sacks; handles, N. O. S.; molasses and sugar, in bbls. or hhds.; paper for the manufacture of bags, in rolls, L. C. L.; soap, common, in boxes.

Official Classification.

1st class:

Dry goods, N. O. S., in bales or boxes, L. C. L.; boots and shoes, in boxes, L. C. L.; drugs and medicines, N. O. S., L. C. L.; earthen-

ware and crockery, L. C. L.; vehicles, L. C. L.; saddlery, boxed, N. O. S., L. C. L.; sewing machines, S. U., boxed or crated, L. C. L.

2nd class:

Spice, L. C. L.; leather, L. C. L.; printing paper, N. O. S., L. C. L.; machines and machinery, N. O. S., crated or boxed, L. C. L.; matting, L. C. L.

3rd class:

Bags, or bagging, burlaps or gunny, in bales or rolls; cotton bagging, L. C. L.; hardware, N. O. S., L. C. L.; cotton piece goods L. C. L.; vehicles, N. O. S., C. L.; printing paper, L. C. L.

4th class:

Coffee, L. C. L.; sugar, L. C. L.; horseshoes, L. C. L.; matting, N. O. S., C. L.; leather, C. L.; sewing machines, C. L.; wall plaster, N. O. S., L. C. L.

5th class:

Agricultural implements, C. L.; axle grease, C. L.; Babbitt metal, C. L.; printing paper, N. O. S., and newspaper, C. L.; machines and machinery, N. O. S., C. L.; school slates, C. L.

279 6th class:

Coffee, C. L.; grain and grain products, C. L.; plaster, wall, N. O. S., C. L.; rails, old and new, C. L.; roofing tile, C. L.; sugar, C. L.

To the 12th interrogatory, he saith: The southern freight classification provides that unless otherwise specified in the classification the minimum car-load weight of all articles loaded in cars 36 feet in length or less, shall be twenty-four thousand pounds, or twelve tons, when the rate applies per net or gross ton. For cars over 36 feet in length minimum car-load weights are provided in proportion to length of the car. Special minimum car-load weights are provided in the classification for quite a large number of articles, the lowest being ten thousand pounds.

The official classification provides that the minimum car-load weight upon all property in first, second and third classes, in car-loads, shall be twenty thousand pounds, and on property in lower than third class, in car-loads, twenty-four thousand pounds. Actual weight to be charged for when in excess of minimum weight. This classification also provides special minimum car-load weights on a large number of articles, the lowest being ten thousand pounds.

The rates, in dollars, per car-load of ten thousand pounds, from New York to Chattanooga and Nashville would be as follows:

To Chattanooga:

1	2	3	4	5	6
$114.00	98.00	86.00	73.00	60.00	49.00

To Nashville:

1	2	3	4	5	6
91.00	78.00	60.00	42.00	36.00	31.00

Excess of Chattanooga over Nashville, in dollars, per car-load of 10,000 pounds:

1	2	3	4	5	6
$23.00	20.00	26.00	31.00	24.00	18.00

The rates in dollars and cents per car-load of 24,000 pounds from New York to Chattanooga and Nashville would be as follows:

To Chattanooga:

1	2	3	4	5	6
$273.00	235.20	206.40	175.20	144.00	117.60

280 To Nashville:

1	2	3	4	5	6
$218.00	187.20	144.00	100.80	86.40	74.40

Excess of Chattanooga over Nashville, in dollars and cents per car-load of 24,000 pounds:

1	2	3	4	5	6
$55.20	48.00	62.40	74.40	57.60	43.20

To the 13th interrogatory he saith: While there are a large number of articles which are placed in the same class in both classifications there are many articles in each classification which are classed lower than in the other. I am unable to state which is the lower as a whole, as in order to determine this definitely it would be necessary to make a comparison of the two classifications as to each article, which would be a very tedious and laborious task.

To the 14th interrogatory he saith: I give below a statement showing a few of the articles which are classed lower in the official classification than in the southern classification, also, the class rates on such articles to Chattanooga and Nashville, and the difference in rate in favor of Nashville:

Statement showing certain articles that are classed lower in the official than in the southern classification; also the rates from New York to Chattanooga and Nashville, Tenn., on such articles and the difference in favor of Nashville.

From New York.	To Chattanooga.		To Nashville.		Difference
Articles.	Southern classification.	Rate per 100 lbs.	Official classification.	Rate per 100 lbs.	In favor of Nashville.
Cigars & cigarettes, boxed (not corded or strapped)	3 times 1	3.42	D. 1	1.82	1.60
Tobacco, plug, in boxes, any quantity	1	1.14	3	.60	.54
Same, released	2	.98	3	.60	.38
Tobacco, leaf, in cases, any quantity	3	.86	4	.42	.44
Chinaware, fine, in bbls. or casks, any quantity	D. 1	2.28	2	.78	1.50
Cheese, in boxes or casks, L.C. L., not released	1	1.14	3	.60	.54
Crockery, in bbls., L. C. L.	1	1.14	4	.42	.72
" " " C. L.	1	1.14	5	.36	.78
Same, released, L. C. L.	2	.98	4	.42	.56
" " C. L.	2	.98	5	.36	.62
Hardware, N. O. S., boxed, any quantity	2	.98	3	.60	.38
Pickles, in glass, C. L.	3	.86	5	.36	.52
Same, released, "	4	.73	5	.36	.37
Starch, in bags, L. C. L.	2	.98	4	.42	.56
" in boxes, L. C. L.	3	.86	4	.42	.44
Starch, C. L	5	.60	6	.31	.29
Tinware, N. O. S., C. L.	2	.98	4	.42	.56
Typewriters & calagraphs, boxed or crated, C. H.	1	1.14	3	.60	.54

281 To the 15th interrogatory, he saith: I give below statement showing a number of articles which are classed lower in the southern than in the official classification, also, the class rates on such articles from New York to Chattanooga and Nashville. The difference in favor of Nashville is also shown, except in the case of cotton piece goods which take same rate to both points. These goods take 5th class in the southern and 3rd class in the official classification. The 5th-class rate to Chattanooga and the 3rd-class rate to Nashville being the same, viz: 60 cents per hundred pounds:

Statement showing certain articles that are classed lower in the southern than in the official classification; also the rates on such articles from New York to Chattanooga and Nashville, Tenn., and the difference in favor of Nashville.

From New York to Chattanooga.			Nashville.		Difference
Articles.	Southern classification.	Rate per 100 lbs.	Official classification.	Rate per 100 lbs.	In favor Nashville.
Agricultural implements, C. L...	6	49	5	36	13
Cotton piece goods.....	5	60	3	60	
Coffee, single sacks, L. C. L	4	73	4	42	31
Coffee, single sacks, C. L	4	73	6	31	42
Coffee, double sacks, L. C. L....	6	49	4	42	07
Coffee, double sacks, C. L.....	6	49	6	31	18
Sugar, N. O. S. in bbls., L. C. L..	6	49	4	42	07
Sugar, N. O. S. in bbls., C. L....	6	49	6	31	18
Crackers, C. L	5	60	4	42	18
Handles, wooden, N. O. S.	6	49	5	36	13
Nails & spikes, in kegs, L. C. L..	6	49	4	42	07
Nails & spikes, in kegs, C. L.....	6	49	5	36	13
Leather, in boxes, L. C. L.	3	86	2	78	08
Molasses, in bbls. or hhds., L.C. L.	6	49	4	42	07
Molasses, in bbls. or hhds., C. L.	6	49	5	36	13

To the **16th** interrogatory, he saith: The following articles are given special commodity rate from New York to Nashville but not to Chattanooga:

Blankets, boots and shoes, buttons, carpets, clothing, collars, combs, comfortables, corsets, drugs, N. O. S., dry goods. N. O. S., fans, folding, gloves, hats, caps, hosiery, matting, medicine, millinery, notions, pins, rugs, shirts silks, suspenders, table oilcloths, thread, umbrellas, underware, waddings.

The special rate New York to Nashville on the above articles is 85 cents per hundred pounds. Nearly all of these articles are in first class in the southern classification, and the rate to Chattanooga on same would therefore be $1.14 per hundred pounds.

To the 17th interrogatory, he saith: The distance by the
282 short-rail line from Chattanooga to Memphis is 310 miles; from Nashville to same point, 238 miles; from Chattanooga to Charleston, 447, and to Savannah, 417 miles; from Nashville to Charleston, 598, and to Savannah, 568 miles. The shortest rail lines from Boston and New York to Chattanooga and Nashville, with distances, are as follows:

From Boston:

	To Chattanooga. Miles.	To Nashville. Miles.
New England R. R., to Willimantic	86	86
New York, New Haven & Hartford R. R., to New York	128	128
Pennsylvania railroad, to Alexandria	236	236
Southern railway, to Lynchburg	166	166
Norfolk & Western railway, to Bristol	204	204
Southern railway, to Chattanooga	242	242
Nashville, Chattanooga & St. Louis R'y, to Nashville	.....	151
	1,062	1,213

From New York:

	To Chattanooga. Miles.	To Nashville. Miles.
Pennsylvania R. R., to Alexandria	236	236
Southern railway, to Lynchburg	166	166
Norfolk & Western railway, to Bristol	204	204
Southern railway, to Chattanooga	242	242
Nashville, Chattanooga & St. Louis R'y, to Nashville	....	151
	848	999

To the 18th interrogatory, he saith: The roads that reach Nashville are, the Louisville & Nashville and the Nashville, Chattanooga & St. Louis railway. The roads that reach Chattanooga are, the Southern railway; Cincinnati, New Orleans & Texas Pacific railway; Nashville, Chattanooga & St. Louis railway; Western & Atlantic railway, Memphis & Charleston railway; Chattanooga, Rome & Columbus railroad and Chattanooga Southern railroad.

To the 19th interrogatory, he saith: Without undertaking to determine the exact number of practicable transportation lines that may be formed from Boston and New York to Chattanooga
283 and Nashville, will say that as a larger number of roads reach Chattanooga than Nashville, it is my opinion that as many and probably more practicable transportation lines can be formed from Boston and New York to Chattanooga than to Nashville.

To the 20th interrogatory, he saith: Chattanooga was in the year 1892, also before and since that time, shown in all tariffs naming rates from points outside to points in that territory in the list of competitive or common points. It was so shown in the tariffs of the Southern Railway & Steamship Association during the existence of that association.

To interrogatories from No. 21 to 29, both inclusive, he saith: I give below a statement showing the short-line distances from Chattanooga

and Nashville to points named in interrogatories Nos. 21 to 29, inclusive.

Table Showing Short-line Distances from Chattanooga and Nashville, Tennessee, to Points Named.

From Chattanooga, Tenn., Via N., C. & St. L. R'y,	To	From Nashville, Tenn., Via N., C. & St. L. R'y,
Miles.		Miles.
38	Stevenson	113
28	Bridgeport	123
69	Decherd	82
82	Tullahoma	69
Via M. & C. R. R.,		Via Short line,
56	Scottsboro	131
72	Woodville	147
Via So. R'y,		Via N., C. & St. L. R'y,
29	Cleveland, Tenn	180
Via So. R'y,		N., C. & St. L. R'y, So. R'y,
56	Athens, Tenn	207
Via A. G. S. R. R.,		N., C. & St. L. R'y, A. G. S.
40	Valley Head, Ala	191
51	Fort Payne, Ala	202
Via Chatt. So. R'y,		N., C. & St. L. R'y, Chatt. So. R'y,
55	Jamestown	206
38	Harrisburg	189
27	Lafayette, Ga	178
45	Summerville, Ga	196
284		
Via So. R'y,		N., C. & St. L. R'y, So. R'y,
27	Cohutta, Ga	173
35	Waring, Ga	186
Via W. & A. R'y,		N., C. & St. L. R'y, W. & A. R'y,
54	Resaca, Ga	205
69	Adairsville, Ga	220
Via Q. & C. R.,		N., C. & St. L. R'y, Q. & C. R.,
38	Dayton	189
55	Spring City	206

To the 30th interrogatory, he saith: I can state nothing further.

JESSE M. SMITH.

I, Eugene L. Gaddess, of Washington, D. C., the commissioner named in the stipulation attached to the interrogatories herein, do certify that I called before me the witness, Jesse M. Smith, and after having duly sworn him to speak the truth, the whole truth, and nothing but the truth, took down his answers to said interrogatories, and that the foregoing pages contain a full, true and correct report of the testimony given by said witness. This the 25th day of August, 1897.

EUGENE L. GADDESS,
Commissioner.

And afterwards, to wit, on the 2nd day of September, A. D. 1897, the depositions of T. A. Snow *et al.* were filed in the clerk's office of said court, which said depositions are clothed in the words and figures following, to wit:

Depositions of T. A. Snow, I. B. Merriam, M. A. Timothy, W. L. Magill, W. J. Dobbs, and T. H. Payne.

(Endorsed:) Filed Sept. 2, 1897. Crawford T. Johnson, Deputy Clerk.

235 In the Circuit Court of the United States for the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION *vs.* THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILway Company *et al.*	In Equity. No. 384.

Stipulation.

In the above-entitled cause it is stipulated and agreed by counsel for the complainant and by counsel for the defendants, that the depositions of the following-named witnesses for the complainant, to wit: T. A. Snow, I. B. Merriam, M. A. Timothy, W. L. Magill, W. J. Dobbs, and T. H. Payne, of Chattanooga, Tennessee, may be taken on the foregoing and annexed direct and cross interrogatories, and may be read in evidence on the hearing of said cause, subject to all exceptions as to relevancy and competency. All formal objections are waived. It is further stipulated and agreed that A. W. Gaines, Esq., of Chattanooga, Tennessee, may act as commissioner in taking said depositions. The issuance of commission to him and formal caption and certificate by him are waived.

L. A. SHAVER,
Counsel for the Interstate Commerce Commission.
ED. BAXTER,
Counsel for the Defendants as of Record.

In the Circuit Court of the United States for the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILway Company *et al.*
} In Equity. No. 384.

Interrogatories in the above-entitled cause on behalf of the complainant therein and to be exhibited to T. A. Snow, I. B. Merriam, M. A. Timothy, W. L. Magill, W. J. Dobbs, and T. H. Payne, of Chattanooga, Tennessee.

286 Interrogatory No. 1. What is your name and place of residence and in what occupation or business are you engaged?

Interrogatory No. 2. If you say you reside at Chattanooga, Tenn., state how long you have resided there, how long you have been engaged in business there, and in what business?

Interrogatory No. 3. State whether merchants of Chattanooga, Tenn., sell goods and do business in the same territory as merchants of Nashville, Tenn., and if so, describe such territory?

Interrogatory No. 4. Name points or localities in which Nashville merchants compete for business with Chattanooga merchants and state how far such points or localities are from Chattanooga, and how far from Nashville?

Interrogatory No. 5. State whether Chattanooga merchants, in competing with Nashville merchants at the points named in answer to the preceding interrogatory are subject to any disadvantage, and if so, state what this disadvantage results from?

Interrogatory No. 6. If in answer to the preceding interrogatory you say such disadvantage exists and results from a discrimination in rates in favor of Nashville and against Chattanooga, give examples of this discrimination in rates in the sale of dry goods, groceries, hardware and other commodities or classes of merchandise?

Interrogatory No. 7. State how long this discrimination in favor of Nashville and against Chattanooga has existed and what effect if any it has upon the business and prosperity of Chattanooga?

Interrogatory No. 8. State the population and mercantile and manufacturing enterprises of Chattanooga.

Interrogatory No. 9. Do transportation rates or charges enter into and affect the prices at which yourself and other Chattanooga merchants can sell goods to consumers?

Interrogatory No. 10. How would a reduction in the rates on goods of all classes from New York and other eastern cities to Chattanooga so as to make the Chattanooga rates not higher than the rates to Nashville affect the prices at which Chattanooga merchants could sell goods to their customers? Would such reduction in rates lower or raise such prices?

Interrogatory No. 11. How do prices of goods affect their sale of consumption? Are more goods sold to consumers when goods are

cheap, or when they are high? What is your opinion and experience in reference to this matter?

287 Interrogatory No. 12. Will a reduction in the rates on all classes of goods from New York and other eastern cities to Chattanooga so as to make them not higher than the rates to Nashville, increase or diminish the tonnage of traffic which will be hauled by the carriers to Chattanooga? Give your reasons for whatever opinion you may express in answer to this interrogatory?

Interrogatory No. 13. What effect, if any, do relatively low or preferential rates to a locality have in increasing the population of such locality and inducing the investment of capital at such locality and in promoting the prosperity of such locality in other respects?

Interrogatory No. 14. What effect, if any, do relatively high rates to a locality or rates which discriminate against a locality have on its prosperity or progress in the respects named in the preceding interrogatory?

Interrogatory No. 15. What is the distance by short-rail line from Chattanooga to Memphis and from Nashville to Memphis?

Interrogatory No. 16. State whether traffic can be shipped from New York and other eastern cities by ocean or gulf to New Orleans and thence by the Mississippi river to Memphis and thence by rail to Chattanooga?

Interrogatory No. 17. What is the distance by the short rail line from Charleston and Savannah respectively to Chattanooga and from Charleston and Savannah, respectively, to Nashville?

Interrogatory No. 18. State whether the bulk of the traffic from New York and other eastern cities to Chattanooga comes by the all-rail lines through Bristol and Hagerstown to Chattanooga or by sea to Charleston and Savannah and thence by rail to Chattanooga.

Interrogatory No. 19. How does the bulk of the traffic from New York and other eastern cities comes to Nashville—by the all-rail lines or by sea and rail via Charleston and Savannah?

Interrogatory No. 20. State whether traffic can be and is transported from New York and other eastern cities via Cincinnati and thence over the Cincinnati, New Orleans & Texas Pacific railway to Chattanooga.

Interrogatory No. 21. What is the distance by the short-rail lines from Cincinnati to Chattanooga and from Cincinnati to Nashville?

Interrogatory No. 22. State how many railroads actually reach Nashville and whether or not the Nashville, Chattanooga and St. Louis railroad is under the control or owned by the Louisville & Nashville Railroad Company?

288 Interrogatory No. 23. Name the railroads which actually reach Chattanooga and state which of those roads actively and actually compete for business from New York and other eastern cities to Chattanooga.

Interrogatory No. 24. Is there any transportation via the Tennes-

see river between Chattanooga and Ohio and Mississippi River points or is such transportation practicable?

Interrogatory No. 25. What goods or commodities constitute the bulk of the traffic from New York and other eastern cities to Chattanooga?

Interrogatory No. 26. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

L. A. SHAVER,
Counsel for the Commission.

Cross-examination waived.

ED. BAXTER,
Sol. for Def'ts as of Record.

In the Circuit Court of the United States for the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION *vs.* THE EAST TENNESSEE, VIRGINIA & GEORGIA Railway Company *et al.* | In Equity. No. 384.

Depositions of T. A. Snow, I. B. Merriam, M. A. Timothy, W. L. Magill, W. J. Dobbs, and T. H. Payne, of Chattanooga, Tennessee, witnesses for the complainant, in the above case, taken by stipulation and agreement by counsel upon interrogatories on the 19 to 31 days of August, 1897, at the office and in the presence of A. W. Gaines, commissioner, at Chattanooga, Tenn.

The witness, W. L. MAGILL, being duly sworn, to speak the truth, the whole truth and nothing but the truth, doth depose as follows:

To the first interrogatory, the witness answers:

289 W. L. Magill, Chattanooga, Tennessee, hardware business.

To the second interrogatory, witness answers:

I have lived in Chattanooga for eighteen years. I have been in the hardware business that long, I mean that I have been in the hardware business in Chattanooga that long.

To the third interrogatory he saith:

Yes; they do. The merchants of Chattanooga sell goods in Tennessee, Georgia and Alabama on the following lines of railway: Nashville, Chattanooga & St. Louis R'y; Memphis & Charleston R. R.; Alabama Great Southern R'y; W. & A. R. R.; Southern railway and Tennessee river. Also on the Cincinnati Southern railroad, the Chattanooga Southern R. R., and on the Chattanooga, Rome & Columbus R. R. With the possible exception of the Chattanooga Southern and the Chattanooga, Rome & Columbus R'r's the merchants of Nashville sell goods on all the aforesaid lines of transportation.

To the fourth interrogatory he answers:

Bridgeport, Ala., 28 miles from Chattanooga, 123 from Nashville; South Pittsburg, Tenn., 34 miles from Chattanooga, 129 from Nashville; Dunlap, Tenn., 62 miles from Chattanooga, 151 miles from Nashville; Pikeville, Tenn., 82 miles from Chattanooga, 171 miles from Nashville: Stevenson, Ala., 38 miles from Chattanooga, 113 miles from Nashville; Cowan, Tenn., 64 miles from Chattanooga, 187 miles from Nashville; Winchester, Tenn., 71 miles from Chattanooga, 80 miles from Nashville.

All the foregoing places are on the Nashville, Chattanooga & St. Louis R'y; Bridgeport, Ala., and South Pittsburg, Tenn., are also on the Tennessee river.

Scottsboro, Ala., 56 miles from Chattanooga and 125 from Nashville; Larkensville, Ala., 62 miles from Chattanooga and 131 from Nashville; Gurleys, Ala., 74 from Chattanooga 173 from Nashville; the last three named places are on the Memphis & Charleston R. R.; Rising Fawn, Ga., 26 miles from Chattanooga and 177 from Nashville; Fort Payne, Ala., 51 miles from Chattanooga and 202 from Nashville; Collinsville, Ala., 66 miles from Chattanooga and 217 from Nashville; these last three places being on the Alabama Great Southern R. R.; Ringgold, Ga., 23 miles from Chattanooga and 174 from Nashville; Tunnel Hill, Ga., 31 miles from Chattanooga and 182 from Nashville; Dalton, Ga., 38 miles from Chattanooga and 189 miles from Nashville; Calhoun, Ga., 60 miles from Chattanooga and 211 from Nashville; Cartersville, Ga., 90 miles from Chattanooga and 241 from Nashville; Acquorth, Ga.,
290 100 miles from Chattanooga and 251 from Nashville; the last six named places are on the Western & Atlantic R. R.; Cleveland, Tenn., 29 miles from Chattanooga and 180 miles from Nashville; Athens, Tenn., 56 miles from Chattanooga and 207 from Nashville; these two places are on the Southern R'y.

Rathburn, Tenn., 22 milesfrom Chattanooga, 173 miles to Nashville; Dayton, Tenn., 38 miles from Chattanooga, 189 to Nashville; Rockwood, Tenn., 70 miles from Chattanooga, 221 from Nashville; these last three places are on the Cincinnati Southern railway.

These are only some of the principal places within this territory.

To the fifth interrogatory he answers:

Chattanooga merchants are at some disadvantage owing to the fact that Nashville merchants have a lower freight rate from the East than Chattanooga merchants have.

To the sixth interrogatory he says:

The rate on hardware from New York to Chattanooga is 98 cents per 100 pounds, and the rate on hardware from New York to Nashville is seventy-eight cents per one hundred pounds. This means that Nashville merchants pay a rate of about twenty-five per cent. less freight on hardware from New York than do Chattanooga merchants.

To the seventh interrogatory he answers:

This discrimination has, I think, existed ever since I have been in business in Chattanooga, that is for the past eighteen years. It

has had the effect of retarding business and prosperity of Chattanooga.

To the eighth interrogatory he saith:

According to our last city directory, which was issued June, 1897, Chattanooga and its immediate suburbs, has a population of about forty-nine thousand.

There are from 55 to 60 manufacturing establishments and some 25 or 30 jobbing ones.

To the 9th interrogatory he answers:

Yes; they do.

To the 10th interrogatory he answers:

It would lower prices and enable us to better meet competition from Nashville.

To the 11th interrogatory he answers:

When the country is prosperous and goods are high-priced on this account, sales are large, that is, it is easier to sell goods on a rising than on a falling market. But when the price of goods is increased by a local cause, or when the prices in one place are higher than those in another because of discrimination in freight rates,
291 or any other such cause, the sales made there will fall off in comparison with those made in a competing market which is not so affected.

To the 12th interrogatory he answers:

I think it will increase the tonnage.

The reason is that Chattanooga will be enabled to sell more goods.

To the 13th he answers:

A city which enjoys low or preferential freight rates is enabled better to compete in their sales with other markets and this tends to build up and benefit merchants and manufacturers.

To the 14th interrogatory he answers:

It tends to retard its growth and prosperity.

To the 15th interrogatory he answers:

Chattanooga is about 315 miles; Nashville to Memphis about 238.

To the 16th interrogatory he answers:

It could be done, but goods would be so long in coming over this route that we have never considered it.

To the 17th interrogatory he answers:

From Charleston to Chattanooga is 443 miles, to Nashville, 594; from Savannah to Chattanooga is 432 miles, to Nashville is 583.

To the 18th interrogatory he answers:

Speaking for hardware—the following three routes (1) the Southern R'y through Bristol and Hagerstown; (2) the C., N. O. & T. P. through Cincinnati, and (3) by sea to Charleston and Savannah and thence by rail to Chattanooga, divide the business somewhat equally among them.

To the 19th interrogatory he answers:

I do not know.

To the 20th interrogatory he answers:

Yes, it can be and is all the time.

To the 21st interrogatory he answers:

From Cincinnati to Nashville is 295 miles and from Cincinnati to Chattanooga is 335.

To the 22nd he answers:

I do not know how many roads reach Nashville, but I understand the L. & N. R. R. Co. either owns or controls the N., C. & St. L. R. R.

To the 23rd interrogatory he answers:

The following roads reach Chattanooga: C., N. O. & T. P.; Southern; W. & A.; C., R. & C.; A. G. S.; Chattanooga Southern; M. & C.; N., C. & St. L. The first four of those above-named compete for eastern freight.

To the 24th interrogatory he answers:

292 No boats are in operation now, but it is practicable.

To the 25th interrogatory he answers:

Dry goods, groceries, drugs, hardware, &c.

To the 26th interrogatory he answers:

I know nothing further.

W. L. MAGILL.

The said witness, T. H. PAYNE, being duly sworn to speak the truth, the whole truth and nothing but the truth, doth depose as follows:

To the 1st interrogatory he answers:

T. H. Payne, Chattanooga, Tenn. Books, stationery and wall paper; and chairman of committee on freight rates of chamber of commerce of Chattanooga.

To the 2nd interrogatory he answers:

Have resided in Chattanooga thirty-three years and been engaged in the book, stationery and wall-paper business for thirty-one years.

To the third interrogatory he answers:

Merchants of Chattanooga sell goods and do business in same territory as Nashville.

Along the Nashville, Chattanooga and St. Louis railroad, and its branches and all roads centering in Chattanooga.

To the 4th interrogatory he answers:

Whiteside	14	miles	from	Chattanooga,	137	from	Nashville.
Bridgeport.....	29	"	"	"	122	"	"
So. Pittsburg.....	34	"	"	"	117	"	"
Jasper.....	40	"	"	"	111	"	"
Stevenson	39	"	"	"	112	"	"

To the 5th interrogatory he answers:

The advantage Nashville merchants have over those of Chattanooga in selling goods in this territory is in getting a lower freight rate from the East.

To the 6th interrogatory he says:

The disadvantage to Chattanooga merchants in competing with Nashville arises from the fact that Nashville rates from the East are lower than to Chattanooga.

In the stationery line—paper and envelopes to Nashville are 78 cents, to Chattanooga 98 cents—a difference of 20 cents per 100 pounds in the freight from New York.

Nashville merchants can sell all the heavy and bulky goods such as paper and envelopes at the price Chattanooga merchants pay and make a living profit.

Another item, roofing slate to Chattanooga by car-load lots 30 cents per 100 lbs., to Nashville 30 cents.

School slates in less than car-load lots freight to Nashville
293 ,42 cents, freight to Chattanooga 86 cents. At the average price of slates from one year to another, it costs about 40 cents on the dollar to lay them down in Chattanooga, while the same goods are hauled 151 miles further and laid down in Nashville for about 20 cents on the dollar, making a difference of about 20 per cent in favor of Nashville, which prohibits the sale of these goods by Chattanooga merchants in territory reached by Nashville.

To the 7th interrogatory he answers:

For years. Depressing on business and retards prosperity by not being on an equal footing in selling merchandise.

To the 8th interrogatory he answers:

Population of Chattanooga and immediate suburbs about 49,000. The number of jobbers about 26, of manufacturers about 57.

To the 9th interrogatory he answers:

They do.

To the 10th interrogatory he answers:

It would lower the price.

To the 11th interrogatory he answers:

If low increases consumption. More are sold when goods are low. If not discriminated against more business would be done in Chattanooga.

To the 12th interrogatory he answers:

Increase. Merchants could handle more lines and find more customers if on an equal footing with Nashville.

To the 13th interrogatory he answers:

It decreases the cost of living to the consumers, this enables the manufacturer to get more and better labor and enables him to find a ready market for manufactured goods not only in this vicinity but in distant points.

To the 14th interrogatory he answers:

Results in stagnation of business and retards progress and prosperity.

To the 15th interrogatory he answers:

Chattanooga to Memphis, 315 miles; Nashville to Memphis, 238 miles.

To the 16th interrogatory he answers:

It can.

To the 17th interrogatory he answers:

From Charleston to Chattanooga is about 443 miles.

From Savannah to Chattanooga is about 432 miles.

From Charleston to Nashville is about 594 miles.

From Savannah to Nashville is about 583 miles.

To the 18th interrogatory he answers:

Evenly divided.

294 To the 19th interrogatory he answers:

Both.

To the 20th interrogatory he answers:

Yes.

To the 21st interrogatory he answers:

From Cincinnati to Chattanooga is 335 miles. From Cincinnati to Nashville is 295 miles.

To the 22nd interrogatory he answers:

I think the N., C. & St. L. R. R. is under the control or is owned by the Louisville & Nashville Railroad Company.

I do not know of any other roads going into Nashville.

To the 23rd interrogatory he answers:

The following roads reach Chattanooga: Cincinnati, New Orleans & Texas Pacific; Southern; Western & Atlantic; Chattanooga, Rome & Columbus; Alabama Great Southern; Chattanooga Southern; Memphis & Charleston and the Nashville & Chattanooga R. R.

The first of those four above named, viz: C., N. O. & T. P.; Southern; W. & A.; C., R. & C., compete for eastern freight.

To the 24th interrogatory he answers:

No regular line of boats yet. Transportation via Tennessee river to Ohio and Mississippi is practicable.

To the 25th interrogatory he answers:

Dry goods, clothing, hardware, drugs, boots and shoes.

To the 26th interrogatory he answers:

I do not know anything further.

T. H. PAYNE.

The said witness, T. A. SNOW, being duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose as follows:

To the 1st interrogatory he answers:

T. A. Snow, of the T. A. Snow Co., dealers in stoves and house-furnishing goods; Chattanooga, Tenn.

I have lived in Chattanooga, Tenn., twenty-four years and been engaged in the same business twenty-four years.

To the 3rd he answers:

Yes, they do. We sell goods all over the South but our competition with Nashville is especially in north Alabama, north Georgia and east Tennessee.

To the 4th he answers:

Bridgeport, Ala., 28 miles from Chattanooga, 123 from Nashville; South Pittsburg, Tenn., 34 miles from Chattanooga, 129 from

295 Nashville; Scottsboro, Ala., 56 from Chattanooga, 125 from Nashville; Fort Payne, Ala., 51 from Chattanooga, 201 from Nashville; and most all other points within a radius of 125 miles from Chattanooga. The distance from Chattanooga to Nashville is 151 miles.

To the 5th he answers:

Chattanooga merchants are at a disadvantage and the chief cause is that Nashville merchants get a very much lower rate of freight from the East than do Chattanooga merchants.

To the 6th he answers:

I know the Nashville merchants get a much lower rate on tin plates and other goods in our line than we do, and tho' I have heretofore figured out the difference I do not remember the exact figures at present.

To the 7th he answers:

I think it has existed ever since I have been in business, that is twenty-four years; we could never sell and make the same profits as the Nashville merchants. This discrimination has seriously affected the prosperity of Chattanooga.

To the 8th he answers:

According to our recent city directory, Chattanooga and its immediate suburbs have a population of about 49,000.

There are from 60 to 70 manufacturing establishments in Chattanooga and about 25 to 30 jobbing houses.

To the 9th he answers:

Of course it does.

To the 10th interrogatory he answers:

It would enable us to make lower prices so as to compete with Nashville.

To the 11th interrogatory he answers:

More goods are sold to merchants on a rising than a falling market; when times are good a greater demand is created for goods. But the increase of prices on account of local causes will decrease the sale of goods in comparison with competing markets.

To the 12th interrogatory he answers:

It would increase the tonnage. We would sell more goods.

To the 13th he answers:

Low rates of freight is a great inducement to a manufacturer to invest and settle in a city, because he can better compete with other manufacturing cities.

To the 14th he answers:

It retards the business in every respect, both manufacturers and merchants.

To the 15th he answers:

296 Chattanooga is about 315 miles from Memphis; from Nashville to Memphis about 238.

To the 16th he answers:

I suppose it might be done, but we have never tried it.

To the 17th he answers:

From Charleston to Chattanooga is about 443 miles and from Charleston to Nashville is about 594 miles; from Savannah to Chattanooga is about 432 miles and to Nashville about 583 miles.

To the 18th he answers:

My own goods comes mostly by way of Charleston.

To the 19th he answers:

I do not know, but a great deal of it comes through Chattanooga.

To the 20th he answers:
Yes, it comes that way.
To the 21st he answers:
From Cincinnati to Chattanooga is 335 miles, from Cincinnati to Nashville is 295 miles.
To the 22d he answers:
I understand that the Louisville & Nashville R. R. Co. owns or controls all the lines of railroad going into Nashville.
To the 23rd he answers:
Southern R'y; C. N. O. & T. P. R. R.; Memphis & Charleston; Nashville, Chattanooga & St. Louis; Western & Atlantic; Alabama Great Southern; Chattanooga, Rome & Columbus, and Chattanooga Southern.
The following compete for traffic from the East: The Southern R'y, the C. N. O. & T. P. through Cincinnati, the Nashville & Chattanooga, and the Western & Atlantic.
To the 24th he answers:
It is practicable, but the boats are not running now regularly; sometimes they run.
To the 25th he answers:
Dry goods, hardware, boots and shoes; stamped ware, tin plate and various kinds of merchandise.
To the 26th he answers:
We want to be on an equal basis with Nashville in freight rates from the East so as to compete with Nashville in making our prices to sell by. There are no further facts that I know of.

T. A. SNOW.

The said witness, W. J. DOBBS, being duly sworn to tell the truth, the whole truth, and nothing but the truth, doth depose as follows:

297 To the first interrogatory he answers:
W. J. Dobbs; wholesale grocery business; Chattanooga, Tennessee.
To the 2nd he answers:
I have lived in Chattanooga about forty years. I have been in the grocery business for twenty-five years.
To the 3rd he answers:
We do business in the same territory with Nashville. We come into competition with Nashville merchants in Tennessee, Georgia and Alabama on the following lines of railroad: N. C. & St. L., Memphis & Charleston; Southern; Alabama Great Southern and Tennessee river.
To the 4th he answers:
We compete with Nashville principally on the line of the Nashville, Chattanooga & St. Louis R. R.; at Bridgeport, Ala., 28 miles from Chattanooga and 123 miles from Nashville; Dunlap, 62 miles from Chattanooga and 151 from Nashville; Pikeville, Tenn., 82 from Chattanooga and 171 from Nashville; Stevenson, Ala., 38 miles from Chattanooga and 113 from Nashville; Cowan, Tenn., 64

miles from Chattanooga and 87 from Nashville; Winchester, Tenn., 71 miles from Chattanooga and 80 from Nashville.

To the 5th he answers:

Are under some disadvantages owing to the difference in freight rates, as Nashville experiences much lower rates than do Chattanooga merchants from the East.

To the 6th he answers:

The rate of freight on canned goods from Baltimore to Chattanooga is 45 cents in car-load lots, and in less than car-load lots 56 cents. From Baltimore to Nashville the rate is 33 cents in car-load lots and 39 cents in less than car-load lots. Or a difference of almost 40 per cent.

On canned goods from New York to Chattanooga car-load lots 48 cents, less than car-load lots 56 cents. From New York to Nashville, car-load lots 36 cents and on less than car-load lots 42 cents.

On green coffees from Baltimore to Chattanooga, our rate is 46 cents. Baltimore to Nashville the rate is 28 cents.

On green coffees from New York to Chattanooga our rate is 49 cents; from New York to Nashville the rate is 31 cents.

On keg soda from New York to Chattanooga our rate 60 cents; from New York to Nashville the rate is only 36 cents. From New York to Louisville, Ky., the rate is only 12 cents. We have been shipping in car-load lots keg soda to Louisville, Ky., and re-
298 shipping via Nashville to Chattanooga *and* a cost of only 44½ cents; after paying the local rate from Louisville to Nashville and from Nashville to Chattanooga, we make a saving of over 15 cents.

On baking powders from New York to Chattanooga on less than car-load lots 86 cents and on car-load lots 73 cents. From New York to Nashville in less than car-load lots 60 cents and on car-load lots 42 cents.

To the 7th he answers:

The freight discrimination in favor of Nashville has existed for years and years, ever since I have been in business.

It has prevented the Chattanooga jobber from reaching out into the territory properly belonging to Chattanooga. The Chattanooga jobbers can only sell in the extreme part of their territory such goods as rates of freight do not enter their consideration, for instance—on account of their lightness—as extracts, blueing, and other small items. Also goods sold on equality plan; that is where the buyer is allowed the freight from the shipping point to his destination or a delivered price named by the manufacturer putting every jobber on an equal footing regardless of his location.

To the 8th interrogatory he answers:

The population of Chattanooga is I guess in the neighborhood of 50,000. I cannot give the number of jobbing and manufacturing enterprises of Chattanooga.

To the 9th interrogatory he answers:

Certainly.

To the 10th interrogatory he answers:

It would enable the Chattanooga jobber to name lower prices to his customers.

To the 11th he answers:

If we can name a lower price than other jobbing points we can reach out and sell more goods. On a rising market the demand is greater, therefore we sell more goods than on a weak market; when everything is declining the demand is less. But if the increased price is due to freight rates our customer will go to a town that has a lower rate of freight.

To the 12th he answers:

A reduction to Chattanooga from New York and other eastern points in freight rates placing the Chattanooga jobber on an equal footing with Nashville would naturally increase business and thereby give the railroad companies more tonnage.

To the 13th he answers:

It would be an inducement to attract merchants and manufacturers to the city.

299 To the 14th he answers:

It has a tendency to break down commerce and prevents a merchant from increasing his force, decreases profits and paralyzes business in general.

To the 15th he answers:

From Chattanooga to Memphis is about 330 miles; from Nashville to Memphis about 240.

To the 16th he answers:

It can be done, but it would be such a distance as would be impracticable.

To the 17th he answers:

I think the distance from Charleston to Chattanooga is about 450 miles and from Charleston to Nashville about 600 miles. From Savannah to Chattanooga is about 432 miles and to Nashville 583 miles.

To the 18th he answers:

Groceries from eastern points are about equally divided between the different routes leading to Chattanooga.

To the 19th he answers:

To the best of my information about three-fourths of the goods from the East to Nashville come through Chattanooga.

To the 20th he answers:

We route some goods via Cincinnati over the Cincinnati, New Orleans & Texas Pacific R. R. to Chattanooga.

To the 21st he answers:

From Cincinnati to Chattanooga is 335 miles and from Cincinnati to Nashville is 295 miles.

To the 22nd he answers:

I do not know how many roads enter Nashville. My understanding is that the C., N. & St. L. R. R. is owned and controlled by the L. & N. Company.

To the 23rd he answers:

The following roads reach Chattanooga: Southern; W. & A.; C. R. & C.; A. G. S.; Chattanooga Southern; M. & C.; N., C. & St. L.; C., N. O. & T. P. The W. & A. and Southern roads bring most of the eastern freight into Chattanooga.

To the 24th he answers:

At present there is no transportation company operating between Mississippi and Ohio River points and Chattanooga.

Some time ago Chattanooga merchants operated a boat line between above points, but it was not a success from the fact that the boat was not the kind of boat that was required for such traffic and was operated by inexperienced men who could not give it
300 their personal attention. I feel confident that with a boat built for the purpose that it would be possible and practicable to operate between Chattanooga and the above points.

To the 25th interrogatory he answers:

The bulk of the goods we receive from the East are green coffees, sugars, sodas, baking powders and all kinds of canned goods. And other items handled by other merchants.

To the 26th interrogatory he answers:

Chattanooga does not ask any favors—only a fair show. Give us equal rates from the East with Nashville and our trade would double in a very short time. The practical outcome of all this is shown in the following statement of the discrimination of rates operating against Chattanooga and in favor of Nashville.

	From New York to Nashville.	To Chattanooga.
First class	91 cents	114 cents.
Second class	78 "	98 "
Third class	60 "	86 "
Fourth class	42 "	73 "
Fifth class	36 "	60 "
Sixth class	31 "	49 "

From New York to Nashville is 1,014 miles, to Chattanooga 863.

	From Philadelphia to Nashville.	To Chattanooga.
First class	85 cents	108 cents.
Second class	72 "	92 "
Third class	58 "	84 "
Fourth class	40 "	71 "
Fifth class	34 "	58 "
Sixth class	29 "	47 "

From Philadelphia to Nashville is 924 miles, to Chattanooga, 773.

	From Baltimore to Nashville.	To Chattanooga.
First class	83 cents	106 cents.
Second class	70 "	90 "
Third class	57 "	83 "
Fourth class	39 "	70 "
Fifth class	33 "	57 "
Sixth class	28 "	46 "

From Baltimore to Nashville is 810 miles, to Chattanooga 659.

Such discriminations existing as the above rates, it is utterly impossible for Chattanooga merchants to maintain their
301 legitimate territory. It is absolutely wrong for Nashville to have such material advantage in competing with others in a common market. Chattanooga merchants are entitled to their natural advantages. It is very subduing to Chattanooga jobbers when competing with Nashville merchants to know that Nashville enjoys so much lower rates from all points, regardless of geographical location.

There are comparatively few goods shipped from the East to either Chattanooga or Nashville via Cincinnati. Nearly all shipments from the East to Nashville come through Chattanooga, as the distance from New York to Nashville via Chattanooga is 1,014 miles and from New York to Nashville via Cincinnati is 1,053 miles.

The through rate from the East to Chattanooga is in many instances higher than the rate through from New York to Chattanooga via Nashville, paying local rates from Nashville to Chattanooga. In other words, sometimes goods are shipped in car-load lots to Nashville and reshipped to Chattanooga, taking the local rate out of Nashville to Chattanooga a slight saving is made over the through rate from New York to Chattanooga.

W. J. DOBBS.

The said witness, I. B. MERRIAM, being sworn to speak the truth, the whole truth and nothing but the truth, doth depose as follows:

To the 1st interrogatory he answers:

My name is I. B. Merriam; reside in Chattanooga, Tenn.; and am engaged in the wholesale grocery business.

To the second interrogatory he answers:

About eighteen years; have been engaged in the wholesale grocery business about eighteen years.

To the 3rd interrogatory he answers:

Yes. All points between Chattanooga and Nashville along the N., C. & St. L. R. R. within 75 miles of Chattanooga, along the Alabama Great Southern R. R., M. & C. R. R. and in northern Alabama and middle Tennessee.

To the 4th interrogatory he answers:

Bridgeport, 28 miles from Chattanooga; 123 from Nashville.

Dalton, 38 miles from Chattanooga; 189 from Nashville.

Fort Payne, Ala., 51 from Chattanooga; 202 from Nashville; and other places.

To the 5th interrogatory he answers:

302 The Chattanooga merchants are at a disadvantage in competing with Nashville merchants, and this arises from the fact that the rates from the East on freight are so much lower to Nashville than to Chattanooga that it enables the merchants of Nashville to reship their goods and sell them at lower rates than is possible for Chattanooga merchants in the same territory.

To the 6th interrogatory he answers:

The rate from New York to Nashville on coffee is 31 cents, pass-

ing through Chattanooga; and from New York to Chattanooga 49 cents, enabling Nashville to ship coffee from New York to Nashville and come back to Chattanooga on the same line for less than Chattanooga gets her rates from New York.

Canned goods from Baltimore to Nashville cost 35 cents per 100 pounds and to Chattanooga 48 cents, giving them the same advantage as in coffee.

This discrimination in favor of Nashville and against Chat., continues on all other lines shipped from the East.

To the 7th interrogatory he answers:

As long as I have been in the grocery business in Chattanooga—eighteen years.

To the 8th interrogatory he answers:

The population of Chattanooga and suburbs is about 49,000. There are four wholesale grocery houses in Chattanooga, doing a business annually of between $2,000,000 and $3,000,000. The manufacturing interests are very large, but I am not posted as to the amount of business done by them.

To the 9th interrogatory he answers:

It does affect prices.

To the 10th interrogatory he answers:

It would lower the prices to Chattanooga consumers.

To the 11th interrogatory he answers:

The lower the price the greater the consumption. The lower the price the greater the bulk sold.

To the 12th interrogatory he answers:

It will increase it. It will enable Chattanooga merchants to compete with Nashville merchants at all points and sell a greater volume of goods.

To the 13th interrogatory he answers:

Low rates to a locality increase the commercial trade and induce men to invest capital in business. And the greater the number of business houses the greater the number of employés and of population. They advance the prosperity of the place in every respect.

To the 14th interrogatory he answers:

High rates of freight keep out business of every character.

303 To the 15th interrogatory he saith:

The distance from Chattanooga to Memphis is 315 miles and from Nashville is 238 miles.

To the 16th interrogatory he answers:

It can, but goods are not shipped over this route to Chattanooga in any appreciable amount.

To the 17th interrogatory he answers:

Charleston to Chattanooga, 447 miles; Savannah to Chattanooga, 432 miles; Charleston to Nashville, 590, Savannah to Nashville, 583 miles.

To the 18th he answers:

I believe the bulk of freight comes by water via Norfolk, Savannah and Charleston and thence by rail to Chattanooga.

To the 19th interrogatory he answers:

I believe via Charleston, Norfolk and Savannah and then by rail to Chattanooga and then to Nashville.

To the 20th he answers:

Freight is transported via Cincinnati by rail to Chattanooga.

To the 21st he answers:

The distance from Cincinnati to Chattanooga is by rail 335 miles. Cincinnati to Nashville 295 miles by rail.

To the 22nd interrogatory he answers:

Nashville, Chattanooga & St. Louis and the Louis. & Nashville. Don't know as to the control or ownership.

To the 23rd he answers:

The following roads enter Chattanooga: A. G. S.; Southern; Cincinnati Southern; C., R. & C.; Memphis & Charleston; Western & Atlantic; N., C. & St. L.; Jasper branch of N., C. & St. L., and the Belt road.

The following four compete for the New York trade: Southern, known as the East Tennessee, Virginia & Georgia R. R.; N., C. & St. L., or Western Atlantic; C., N. O. & T. P., or Queen & Crescent, and the C., R. & C.

To the 24th he answers:

There is from St. Louis and other points on the Mississippi and sugar has been shipped from New Orleans.

To the 25th he answers:

Dry goods, groceries, canned goods, clothing and hats, shoes, drugs, hardware and all kinds of merchandise and manufacturing goods.

To the 26th interrogatory he answers:

The rate of freight as given in my testimony from New York to Chattanooga and to Nashville gives Nashville a *a* chance to undersell Chattanooga at all competitive points, and forces Chattanooga out of the market at those points. As an illustration—seven
304 years ago Chattanooga had seven wholesale grocery stores and she now has four. She had two wholesale dry-goods stores, she now has one. She had two wholesale shoe stores; she now has one. The volume of trade has increased in Nashville, but has not increased in Chattanooga.

I. B. MERRIAM.

The said witness, M. A. TIMOTHY, being sworn to speak the truth, the whole truth and nothing but the truth, doth depose as follows:

To the 1st interrogatory he answers:

M. A. Timothy, Chattanooga, Tenn.; in dry-goods business.

To the 2nd interrogatory he answers:

I have lived in Chattanooga for sixteen years; engaged all this time in the dry-goods business.

To the 3rd interrogatory he answers:

Yes, about the same; north Georgia and Alabama, Mississippi and in east and middle Tennessee.

To the 4th interrogatory he answers:

The Nashville, Chattanooga & St. Louis R'y connects Nashville with Chattanooga, the distance between the two points being 151 miles. The merchants of the two cities compete for business on all points on all lines of railroads centering in Chattanooga.

To the 5th interrogatory he answers:

Chattanooga merchants have to pay more freight on goods from the East than do Nashville merchants and therefore cannot compete in the sale of their goods with the latter.

To the 6th interrogatory he answers:

I can only speak for dry goods. The rate of freight on first-class freight from New York to Nashville is 90 cents on the hundred pounds; rate the same from New York to Chattanooga is $1.14 per one hundred pounds.

To the 7th interrogatory he answers:

It has existed a long while, as long as I remember, certainly as much as eight or ten years.

It has the effect of driving trade away from Chattanooga.

To the 8th interrogatory he answers:

Chattanooga and suburbs has from 45,000 to 50,000 population. There are in the city from 25 to 30 jobbers and from 55 to 60 manufacturers.

To the 9th interrogatory he answers:

Most unquestionably it does.

To the 10th interrogatory he answers:

305 It would lower the prices.

To the 11th interrogatory he answers:

My experience is that the cheaper the goods are the greater amount there is consumed.

To the 12th interrogatory he answers:

Yes, it will certainly increase the tonnage. It will enable the Chattanooga merchants to sell more goods and will therefore enable them to bring more goods here as a distributing point.

To the 13th interrogatory he answers:

It increases the business, brings more people to purchase goods, reduces living expenses, it induces the investment of capital and in every way promotes the prosperity of the place.

To the 14th interrogatory he answers:

It will have just the opposite effect from that described in the previous answer.

To the 15th interrogatory he answers:

Chattanooga to Memphis 315 miles; Nashville to Memphis 238 miles.

To the 16th interrogatory he answers:

It can, but I have never had any shipped that way.

To the 17th interrogatory he answers:

I am not informed.

To the 18th interrogatory he answers:

The bulk of the goods shipped from the East to Chattanooga comes by sea to Norfolk, Charleston or Savannah and thence from these respective points by rail to Chattanooga.

To the 19th interrogatory he answers:

It follows exactly the same routes as above mentioned through Chattanooga to Nashville.

To the 20th interrogatory he answers:

I guess it can, but I do not ship any that way.

To the 21st interrogatory he answers:

From Cincinnati to Chattanooga is about 335 miles; from Cincinnati to Nashville 295 miles.

To the 22nd interrogatory he answers:

Only two, the Nashville, Chattanooga & St. Louis R'y and the Louisville & Nashville R. R. I believe the N. C. & St. L. is owned by or is under the control of the L. & N. R. R. Co.

To the 23rd interrogatory he answers:

C., N. O. & T. P.; Southern; W. & A.; Chatta., Rome & Columbus; A. G. S.; Chatta. Southern; Memphis & Charleston and the N. C. & St. L. R. R.

The N. C. & St. L. (controlling the W. & A.) and the Southern complete.

306 To the 24th interrogatory he answers:

There is none that I know of, and I don't think it is practicable.

To the 25th interrogatory he answers:

Dry goods, clothing, coffees, sugar and such goods.

To the 26th interrogatory he answers:

The above are the facts; I do not think I can state anything further.

M. A. TIMOTHY.

I, A. W. Gaines, of Chattanooga, Tenn., the commissioner named in the stipulation attached to the interrogatories herein, do certify that I called before me the said witnesses, to wit: W. L. Magill, T. H. Payne, T. A. Snow, W. J. Dobbs, I. B. Merriam and M. A. Timothy, and after having duly sworn them to speak the truth, the whole truth and nothing but the truth, had their answers to said interrogatories taken down, and that the foregoing pages contain a full, true and correct report of the testimony given by each of said witnesses.

This 2nd day of September, 1897.

A. W. GAINES,
Commissioner.

And afterwards, to wit, on the 1st day of October, A. D. 1898, two letters were filed in the clerk's office of said court, which said letters were clothed in the words and figures following, to wit:

Letters Filed by Defendant.

(Endorsed:) Filed Oct. 1, 1897. Henry O. Ewing, Clerk.

SUN BUILDING,
WASHINGTON, D. C., *September* 29, 1897.

THE INT. COM. COM.
vs.
THE E. T., V. & G. R'Y CO. ET AL. } In Equity. No. 384.

The clerk of the U. S. circuit court, Chattanooga, Tenn.

DEAR SIR: Referring to the depositions which were taken before me in the above-entitled case, which were filed with you in August

last, I have received the attached letter from one of the wit-
307 nesses to whom I sent a copy of the testimony, and I request that this correspondence be filed with his deposition, as under agreement of counsel the witnesses did not have an opportunity to read their depositions after they had been transcribed from the shorthand notes. My original shorthand notes agree with the testimony as filed, that is the word reads "similar."

Very respectfully, FRANK LYON.

Louisville & Nashville Railroad Company. Office of the traffic manager; Y. van den Berg, traffic manager.

LOUISVILLE, KY., *September* 14, 1897.

Mr. Frank Lyon, 1317 *Front* street N. W., Washington, D. C.

DEAR SIR: Please see page 27 of case No. 13 (Mr. Baxter's number) I. C. C. *vs.* E. T., V. & G. Railway Co. *et al.*

I am incorrectly quoted in my answer to cross-interrogatory No. 44, *i. e.*, "So far as my knowledge goes no exception has been made in making a greater charge for the shorter than for the longer distance under similar circumstances and conditions."

It should read, "under dissimilar circumstances and conditions."

In other words, the meaning I intended to convey is that under dissimilar circumstances and conditions I know of no exception having been made in charging more for the shorter than for the longer distance.

Please make the necessary correction. I have sent copy of this to Mr. Baxter.

Yours truly, Y. VAN DEN BERG,
Traffic Manager.

And afterwards, to wit: on the 27th day of October, A. D. 1897, a certain tabulated statement was filed in the clerk's office of said court, which said tabulated statement is clothed in the words and figures following, to wit:

Tabulated Statement.

(Endorsed:) Filed Oct. 27, 1897. Crawford T. Johnson, Deputy Clerk.

Name of road.	1892. Average receipts per ton per mile.	1892. Estimated cost of carrying one ton one mile.	1893. Average receipts per ton per mile.	1893. Estimated cost of carrying one ton one mile.	Average receipts per ton per mile. 1894.	1895.	1896.
I.	*Cents.*	*Cents.*	*Cents.*	*Cents.*	*Cents.*	*Cents.*	*Cents.*
1. Louisville & Nashville R. R.	.948	.621	.917	.614	.876	.831	.806
2. Nashville, Chattanooga & St. Louis R'y	1.035	.599	1.067	.610	1.043	.920	.925
3. Cincinnati, New Orleans & Texas Pac. R'y	.779	.571	.745	.576	.757	.724	.720
II.							
1. Pennsylvania R. R.	.647	.448	.620	.447	.606	.565	.563
2. New York, New Haven & Hartford R. R.	1.747	1.425	1.867	1.477	1.864	1.658	1.570
3. Pittsburg, Cincinnati, Chic. & St. L. R'y	.706	.551	.709	.557	.674	.692	.673
4. Fitchburg R. R.	.925	.712	.923	.707	.895	.878	.864
5. West Shore R. R. (1)							
6. Lake Shore & Michigan Southern R'y	.592	.416	.599	.421	.587	.567	.551
7. Cleveland, Cin., Chic. & St. Louis R'y	.710	.481	.701	.501	.649	.651	.631
8. New York, Chicago & St. Louis R'y	.537	.438	.545	.443	.534	.533	.517
9. New York Central & Hudson River R'y	.699	.518	.701	.514	.733	.726	.668
10. Cumberland Valley R. R.	1.285	1.058	1.206	.931	1.151	1.148	1.137
11. New York, Philadelphia & Norfolk R. R.	1.004	.885	1.057	.843	1.067	1.021	.976
III.							
1. East Tennessee, Virginia & Georgia R'y (2)	.874	.675	.855	.597	.820	.594	
2. Norfolk & Western R. R.	.545	.362	.516	.359	.472	.446	.447
3. Richmond & Danville R. R. (3)	1.355	.929	1.211	.933	1.128		
4. Western & Atlantic R. R. (4)							
5. Central Railroad & Banking Co. of Ga. (5)	1.356	(6) .972	1.246	.963	1.279	1.183	1.197
6. Georgia Railroad & Banking Co. (7)							
7. Atlanta & West Point R. R.	1.639	.931	1.631	1.037	1.743	1.726	1.655
8. Southern R'y						1.047	1.030
9. Western R'y of Ala.	1.699	1.077	1.674	1.057	1.701	1.586	1.505

(1) Financial report filed. Operations included in those of New York Cent. & Hud. Riv. R. R.
(2) Report for 1892 covers period July 1 to June 24. Report for 1893 covers period June 25, 1892, to June 30, 1893. Report for 1895 for month ending July 31, 1894, included in Southern R'y Aug. 1, 1894.
(3) Reorganized as Southern R'y June 18, 1894.
(4) No report filed. Operations included in those of Nashv., Chat. & St. L. R'y.
(5) Report for 1892 covers period Jan. 1 to March 4. Report for 1895 covers four months ending Oct. 31.
(6) As figured by this office. No computation made by road.
(7) Financial report filed. Operations included in those of Georgia R. R.

Interstate Commerce Commission,
Division of Statistics, Oct. 20, 1897.

I, Edward A. Moseley, secretary of the Interstate Commerce Commission, hereby certify that the above is a true and accurate statement from the reports of the carriers named therein for the years 1892 to 1896, inclusive, made to and on file with the Interstate Commerce Commission, this the 20th day of October, 1897.

EDW. A. MOSELY, *Secretary.*

2022

309 And afterwards, to wit, on the 24th day of November, A. D. 1897, a certain stipulation was filed in the clerk's office of said court, which said stipulation is clothed in the words and figures following, to wit:

Stipulation.

(Endorsed:) Filed Nov. 24, 1897. Crawford T. Johnson, Deputy Clerk.

In the Circuit Court of the United States for the Eastern District of Tennessee, at Chattanooga, Tennessee.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA & GEORGIA Railway Co. *et al.*
} In Equity. No. 384.

In this cause, in the matter of the petition filed by the Interstate Commerce Commission and the answers filed thereto by the defendants named therein, it is agreed by the attorney for the Interstate Commerce Commission and the attorney for the defendants, that the following facts are true:

I.

That the capital stock of the Nashville, Chattanooga & St. Louis railway is $10,000,000, and is represented by 100,000 shares.

II.

That the Central Trust Company of New York, as trustees, holds 55,005 shares of the capital stock of the Nashville, Chattanooga & St. Louis railway, in trust for the Louisville & Nashville Railroad Company and that said stock was purchased March 1, 1882.

III.

That the Louisville & Nashville Railroad Company, for the fiscal year, ending June 30, 1896, received as income or dividends on account of the stock of the Nashville, Chattanooga & St. Louis railway, held by the Central Trust Company of New York, for it, as trustee, $220,060.00.

IV.

That the affairs of said Nashville, Chattanooga & St. Louis
310 Railway Company are managed by a board of directors, consisting of fifteen (15) members, who are chosen by the stockholders from their own body and the president of the company is elected by the directors from among their own number; and that in all elections for directors, each share of stock is entitled to one vote.

V.

It is agreed by the attorneys aforesaid, that J. W. Thomas, president; George R. Knox, general freight agent, and W. L. Danley,

general passenger agent of the Nashville, Chattanooga & St. Louis railway, and M. H. Smith, president; S. R. Knott, first vice-president, and Y. van den Berg, traffic manager of the Louisville & Nashville Railroad Company would testify to the following as facts, and that the same may be considered by the court, as if the depositions of said witnesses had been duly taken in this case, and they had testified thereto. All objections to the competency or relevancy of the testimony are reserved as fully as if the depositions of said witnesses had been duly taken.

(*a.*) That the Nashville, Chattanooga & St. Louis railway is a separate and distinct railway corporation; that it is managed and operated separately and apart from the Louisville & Nashville Railroad Company; and is managed and operated by a separate and distinct corps of officers, employés and servants.

(*b.*) That the officers of the Nashville, Chattanooga & St. Louis railway make the rates upon their different lines and branches, according to their own policy and best judgment, and not under the direction, advice or supervision of the officers of the Louisville & Nashville Railroad Company.

(*c.*) That the entire management of the Nashville, Chattanooga & St. Louis railway is under the control of a separate and distinct corps of officers and employés, from the president down, whose salaries are paid by the Nashville, Chattanooga & St. Louis railway.

(*d.*) The Nashville, Chattanooga & St. Louis railway has a separate and distinct board of directors from that of the Louisville & Nashville Railroad Company.

(*e.*) That the Nashville, Chattanooga & St. Louis railway is an active and actual competitor of the Louisville & Nashville railroad, for traffic at all points, where it comes in competition with the Louisville & Nashville railroad.

(*f.*) That the Nashville, Chattanooga & St. Louis railway competes as aggressively with the Louisville & Nashville railroad
311 for all traffic where it comes in competition with said railway company, as it does with any other railroad, or common carrier, for traffic at competitive points.

(*g.*) That the Nashville, Chattanooga & St. Louis railway is an actual and active competitor with the Louisville & Nashville railroad, for all traffics from Boston, New York and other eastern cities, destined to Memphis and to Nashville, Tennessee.

L. A. SHAVER,
Counsel for the Interstate Commerce Commission.
ED. BAXTER,
Counsel for Defendants.

THE BOARD OF TRADE OF CHATTANOOGA
vs.
THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY Company, The Norfolk & Western Railroad Company, The Old Dominion Steamship Company, The Western and Atlantic Railway Company, The Central Railroad & Banking — of Georgia, The Georgia Railroad Company, The Ocean Steamship Company of Savannah, The South Carolina Railway Company, The Clyde Steamship Company, The Cincinnati, New Orleans & Texas Pacific Railway Company, The Baltimore & Ohio Railroad Company, The Central Railroad of New Jersey, The Nashville, Chattanooga & St. Louis Railway Company, The Pennsylvania Railroad Company, The Pennsylvania Company, The New York, Lake Erie & Western Railroad Company, The New York and New England Railroad Company, and The Delaware & Hudson Canal Company.

Testimony Taken at Chattanooga, Tenn., November 12 & 13, 1890.

312 The Interstate Commerce Commission.

CHATTANOOGA, TENN., *November* 12, 1890—10.45 a. m.

THE BOARD OF TRADE OF CHATTANOOGA
vs.
THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY Company *et al.*

Present: Commissioner Morrison, acting chairman: Commissioner Bragg; Commissioner Veazey.

Appearances.

Messrs. G. C. Connor, J. A. Moon, and E. S. Daniels, for complainant.

Mr. W. M. Baxter, for the East Tennessee, Virginia & Georgia Railroad Company.

Mr. A. Pope, for the Norfolk & Western Railroad Company.

Mr. Pope, for the Old Dominion Steamship Company.

J. L. Dickey, general freight agent, for the Western & Atlantic.

A. B. Lawton, Jr. for the Central Railroad & Banking Company of Georgia, and for the Ocean Steamship Company of Savannah.

Messrs. Sheppard & Cist, for the Cincinnati, New Orleans & Texas Pacific Railway Company.

Messrs. Clark & Brown, for the Nashville, Chattanooga & St. Louis Railway Company.

Com'r MORRISON: Gentlemen, you can now proceed.

(Mr. Moon read the petition in this case.)

(Mr. Baxter read the answer of the East Tennessee, Virginia & Georgia Railway Company.)

Mr. POPE: Besides the answer read by Mr. Baxter which was the

technical answer of the Norfolk & Western Railroad Company also, that company considered that it was entirely proper to make further answer which it did in conformity with the rules of the commission; and in making that answer they were entirely willing to disclose the views they entertained in reference to the matter that had been complained of. They did not desire to avail themselves of
313 any technical practice that might obtain before you whether to refuse or to delay the disclosing of their answer until the trial of the case. Therefore, I make this explanation that we made a further answer setting forth the views we entertained. That answer was furnished the complainants in order that they might understand the matter. If you desire it I will read it. Of course the complainants were furnished a copy of it.

Com'r MORRISON: Use your own pleasure about that.

Mr. POPE: I do not desire to take up the time of the commission in reading it unless they desire it.

Com'r BRAGG: I would like to hear it read. I suppose it gives the reasons upon which you rely.

(Mr. Pope reads the separate answer of the Norfolk & Western Railroad Company.)

Com'r MORRISON: Is there any statement to be made in behalf of any other respondent?

Mr. CLARKE: I will read the answer of the Nashville, Chattanooga & St. Louis Railway Company.

Com'r MORRISON: Does it state different reasons from the others?

Mr. CLARKE: Yes, sir.

Com'r MORRISON: Then you can read it.

(The answer referred to was then read by Mr. Clarke.)

Mr. LAWTON: On behalf of the Georgia Central Railroad Company, I would like to state that the answer of that company is very much in the line of that of the East Tennessee, Virginia & Georgia Railway Company, but also, in addition, it sets up the fact that freight destined for Nashville and Memphis via the Georgia Central Railroad Company, that is to say via the Ocean Steamship Company of Savannah and the Georgia Central Railroad Company, from New York does not necessarily go through Chattanooga, the Georgia Central having another line by way of Columbus, Atlanta, and Birmingham which is entirely left off of the map attached to the original complaint in this case, and which I have for the first time seen this morning. That is the only additional fact set out in our answer.

Mr. CIST: The C., N. O. & T. P. occupies the same peculiar position in reference to this particular traffic, and it will be necessary to read only a part of the answer.

(Mr. Cist reads paragraph V of the answer referred to.)

Com'r MORRISON: Is there anything further by way of statement?

Mr. DICKEY: In behalf of the Western & Atlantic I have to say that we join in the rates from the North and West. We have
314 participated in the rates complained of to Nashville and Memphis, but have done it on the idea that they were based

on combinations from Chattanooga and have participated in those rates on the usual basis of divisions. I had not the slightest idea we were violating any laws when we did so.

Com'r MORRISON: There seem to be no further statements. Go on with the testimony.

Mr. CONNOR: May it please the court, in order to shorten the time and not to bring in matter irrelevant, as we understand the respondents now, the first question they make is that we do not participate for business in the same territory as Nashville and Memphis. We submit in a general way our figures on this subject, and if there be any clerical errors we hope the commission will correct them, as we do not wish to present any figures except those which are correct.

I would like to ask if the court is now ready to hear testimony as to whether the cities of Cincinnati, Nashville, Chattanooga and Memphis compete in the same territory, since the question raised is whether they do so compete.

Com'r MORRISON: You may follow your own course in regard to that.

P. W. DRACKETT, a witness on behalf of the complainant, having been duly sworn, testified as follows:

Direct examination.

By Mr. DANIELLS:

Mr. DANIELLS: Where do you reside, Mr. Drackett?

Mr. DRACKETT: In Chattanooga, Tenn.

Mr. DANIELLS: What is your business?

Mr. DRACKETT: Drug business.

Mr. DANIELLS: With what firm are you connected?

Mr. DRACKETT: The firm of Drackett & Company.

Mr. DANIELLS: You may tell the commission in what territory you sell your goods.

Mr. DRACKETT: We sell goods along the Nashville & Chattanooga road; the A. G. S., the C., N. O. & T. P. and the East Tennessee, both South and West.

Mr. DANIELLS: Have you a wholesale store?

Mr. DRACKETT: Yes, sir.

Mr. DANIELLS: You may state whether or not the merchants in your line of business in the cities of Nashville and Memphis compete with you in the same territory.

315 Mr. DRACKETT: Yes, sir; they do.

Mr. DANIELLS: If you know any facts showing a discrimination against Chattanooga and in favor of Nashville and Memphis and other points, please state them to the commission.

Mr. DRACKETT: I can best do that by submitting an illustration. For instance, from Baltimore on the question of epsom salts. We pay the same price in Baltimore for them as Nashville does. The freight from Baltimore to Chattanooga on epsom salts being 57 cents and to Nashville 33 cents, both of us paying the same price of the

salts, 90 cents. The price to this point therefore would be $1.47 and the cost in Nashville is $1.23 per hundred pounds. Now when we go into the Nashville territory to compete with those parties, they are able to sell their salts at a profit and we sell at the same price at a loss. The rate of freight from Chattanooga or Nashville being the same.

Mr. DANIELLS: State whether or not you have computed what per cent. they would make upon those goods even if they sold them at the same price that the article cost you in Chattanooga.

Mr. DRACKETT: Their profit if they sold them at the same price that it costs us to lay them down in Chattanooga would be nearly 15 per cent. The margin in Nashville on the same article would be 24 cents profit if sold at our cost.

Mr. DANIELLS: What I want you to state is exactly what it costs you at Baltimore with the freight added to Chattanooga. Suppose they sold at that price what per cent. profit would they make upon the article?

Mr. DRACKETT: 15 per cent. Another illustration would be sulphur. Sulphur at $1.75 per hundred pounds in New York and freight from New York to this point being 60 cents, would make the cost $2.35 of the goods laid down here. Well, the same goods would cost Nashville $2.11. Therefore in selling at points between Chattanooga and Nashville where the freight to such point is equally the same from Nashville and Chattanooga, we would be compelled to sell at a loss to meet the price of Nashville on the same article.

Mr. DANIELLS: You may state any other fact that you may know.

Mr. DRACKETT: About ten days ago we had a request for quotations on sulphur and salts, the two articles about which I have spoken, at Gadsden, Alabama. We priced to those parties, epsom salts at our cost, $1.47. I made it $1.45, which would have
316 made it two cents loss to us. Nashville offered it at their published price of $1.35 per hundred pounds to the same place. The freight from Nashville to that point was 62 cents, which made the cost to the customer in Gadsden $1.97. Our quotation was $1.45, the freight to Gadsden being 57 cents. Our cost to that party in Gadsden would be $2.02, a loss of five cents had he bought from us, while we were nearer to him than Nashville.

Com'r BRAGG: Now let me ask a question right there please. Over what route from Nashville would that freight be shipped to Gadsden at a rate of five cents more? By what route would it go?

Mr. DRACKETT: We sometimes ship by way of the N. & C. to Chattanooga and other times by way of the L. & N. to Birmingham.

Mr. BRAGG: Is the rate the same either way?

Mr. DRACKETT: I do not know about that. But we more frequently shipped, when I was in Nashville, by way of Chattanooga than by Birmingham.

Mr. DANIELLS: Supposing you sold epsom salts at South Pittsburgh, Tennessee, say at $1.56 and Nashville sold at $1.35, what would be the respective rate of profit in each case?

Mr. DRACKETT: How was that question?

Mr. DANIELLS: Suppose you sold the article of epsom salts at South Pittsburgh at $1.56 and Nashville sold at $1.35, what would be your profit and what would be the profit of the Nashville merchant?

Mr. DRACKETT: The profit on the salts would be the same to both of us. The profit on the epsom salts to Nashville would have been 15 per cent. On epsom salts to us it would have been about 8 per cent. The cost to the customer at South Pittsburgh would have been about the same.

Mr. DANIELLS: You say you travelled at one time for a Nashville house?

Mr. DRACKETT: Yes, sir.

Mr. DANIELLS: During that time did you get any competition with merchants from Chattanooga in your line of business?

Mr. DRACKETT: Yes, sir; quite frequently.

Mr. DANIELLS: Did you have occasion to make rates for customers during that time as against Chattanooga?

Mr. DRACKETT: Quite frequently. Customers would ask me what would be the price of those goods, principally those heavy articles, and I would call their attention to the fact that we could lay the goods down at less than Chattanooga, even though we were further from them—more mileage—than Chattanooga.

317 Mr. DANIELLS: State whether or not you have met that difficulty since you have removed to Chattanooga, from persons from Nashville.

Mr. DRACKETT: In answer to that probably the quotations I have made will explain it. In quotations we have sent out in competition with Nashville prices we have nearly always failed to receive the order and I have heard through our travelling men that Nashville people did get it, although we priced our goods at cost.

Mr. DANIELLS: State whether or not Nashville now is competing with Chattanooga in the same line of business in the same territory.

Mr. DRACKETT: Yes, sir; they are.

Mr. DANIELLS: Locate the territory, please?

Mr. DRACKETT: They send their travelling men over the A. G. S., the East Tennessee as far as Athens, and east to Atlanta, Georgia, and also to Rome, Georgia. Then they go below to Anniston. And they come down to points between here and Nashville over the Nashville & Chattanooga road. They also go over the Memphis & Charleston road the same as we do. On the Memphis road they go beyond Decatur, Birmingham, and Florence. We go to Decatur; we do not go beyond that point.

Mr. DANIELLS: Now, in shipping say from Cincinnati, freight coming through that way, state whether or not you ever had occasion to ship on through Chattanooga to points south, finding that you could get rates as low or lower to points further off.

Mr. DRACKETT: We have an instance of that in a shipment from Cincinnati to point- south on the A. G. S. road, the rate being the same from Cincinnati to that point as to Chattanooga.

Mr. DANIELLS: What point was that?

Mr. DRACKETT: Ragan switch.

Mr. DANIELLS: How far south of Chattanooga?

Mr. DRACKETT: I do not know. It is on the A. G. S. road.

Mr. DANIELLS: That freight came over the Cincinnati Southern to Chattanooga?

Mr. DRACKETT: Yes, sir.

Mr. DANIELLS: Received by the A. G. S.?

Mr. DRACKETT: Yes, sir.

Mr. DANIELLS: State whether or not the rate to Gadsden, Alabama, a point south of here 89 miles, is the same as it is to Chattanooga on the same class of goods—say from Baltimore.

Mr. DRACKETT: I do not know, sir. This much I can say: that we can sell epsom salts at 10 cents a bag on the cost to us and
318 ship it to the customer at Gadsden for less money than to have the goods shipped to us and then have it shipped to the customer from here. Where we sell him shipping from Baltimore direct to Gadsden we would make 10 cents at Gadsden and at the same time would cost the customer less than it would have been if we had shipped from Chattanooga.

Mr. MOON: Do you mean to say that you can ship from Baltimore direct to Gadsden for less than if you stopped the goods in Chattanooga and then sent them to Gadsden?

Mr. BRACKETT: Yes, sir.

Mr. DANIELLS: I believe that is all with this gentleman.

Com'r MORRISON: Gentlemen, do you wish to ask this witness any questions on behalf of the respondents, or any of the——

Mr. BAXTER: I would like to ask a few questions.

Cross-examination:

Mr. BAXTER: Are there any other points, or towns, or cities, with which you compete besides those you mentioned, in this same territory?

Mr. DRACKETT: Yes, sir; a good many others.

Mr. BAXTER: Name some of them.

Mr. DRACKETT: On the A. G. S. road we make all points between here——

Mr. BAXTER: I think you misunderstood my question. You mentioned Memphis, Nashville, and Cincinnati as cities with which you competed in the same territory. Are there any other cities competing with you in the drug business?

Mr. DRACKETT: Of course we meet New York, Baltimore, Boston and Atlanta. Atlanta, though, we do not compete with much; it is not a difficult point to compete with.

Mr. BAXTER: Do you compete with Louisville?

Mr. DRACKETT: Not to any great extent.

Mr. BAXTER: Is the rate to Atlanta *to* same as to Chattanooga?

Mr. DRACKETT: From the East?

Mr. BAXTER: Yes, sir.

Mr. DRACKETT: I do not know, sir. I can soon tell by looking at the tariff.

Mr. BAXTER: Is it the same to Rome as to Chattanooga?

Mr. DRACKETT: Yes, sir; I think it is.

Mr. BAXTER: I understood you to state that you sold goods in Rome?

319 Mr. DRACKETT: No, sir.

Mr. BAXTER: I understood you to answer that you did.

Mr. DRACKETT: I said that the travelling men from Nashville reached as far south as Rome.

Mr. BAXTER: Do you know the local rate from Rome to Gadsden?

Mr. DRACKETT: I do not know sir.

Mr. BAXTER: Do you know whether it is less from Chattanooga than from Rome?

Mr. DRACKETT: I do not know sir.

Mr. BAXTER: Do you know the distance compared with Chattanooga—Chattanooga to Gadsden and Rome to Gadsden?

Mr. DRACKETT: No, sir; I have never looked that up.

Mr. BAXTER: Assuming that the distance is greater from Chattanooga and the rate is the same to Chattanooga and Rome, could you compete with Rome for the sale of goods in Gadsden such as you mentioned?

Mr. DRACKETT: We never have had any competition with Rome.

Mr. BAXTER: Never had any competition with them at all?

Mr. DRACKETT: No, sir.

Mr. BAXTER: Is the rate from New York to Gadsden the same as the rate from New York to Chattanooga?

Mr. DRACKETT: I am not certain about that, sir; I have never looked that up.

Mr. BAXTER: Well, is it not a question more of combination of local rates than anything else?

Mr. DRACKETT: I find that the rate from New York to Gadsden is the same as from New York to Chattanooga.

Mr. BAXTER: Well, then, when you ship goods to Chattanooga, of course you have to rehandle them, and then you have that addition of the local rate; is not the matter you have most to complain of as to whether you can sell at a profit or a loss?

Mr. DRACKETT: I do not know that it is. Since we sell the goods at cost it does not make much difference any way.

Mr. BAXTER: Does it not make the difference of the local rate added?

Mr. DRACKETT: It does to the customer.

Mr. BAXTER: If it makes a difference to him, that limits your trade?

Mr. DRACKETT: I claim that in shipping epsom salts we can ship from Baltimore to Gadsden at 10 cents added to the cost of the goods, and it would cost the customer less at Gadsden than it would if shipped from here.

320 Mr. BAXTER: That is by reason of the local rate from here to Gadsden?

Mr. DRACKETT: It might be in that case; yes, sir.

Mr. BAXTER: Where are your principal purchasing markets for your business?

Mr. DRACKETT: New York, Baltimore, Philadelphia, Brooklyn and Boston.

Mr. BAXTER: Principally in the East?

Mr. DRACKETT: Yes, sir.

Mr. BAXTER: Do you buy any drugs at all from the West?

Mr. DRACKETT: A few patent medicines. They never enter into this matter, as the rate is always paid on those goods.

Mr. BAXTER: Is there any complaint of the adjustment of rates from the West to Chattanooga—through rates?

Mr. BRACKETT: From Nashville to Chattanooga.

Mr. BAXTER: From the West generally?

Mr. DRACKETT: No, sir; we have no shipments from there.

Mr. BAXTER: Any complaint of the adjustment of rates from Chattanooga to the West—through rates?

Mr. DRACKETT: No, sir.

Mr. BAXTER: Then the complaint is of the through rates from the eastern seaboard to Chattanooga, against the East Tennessee road?

Mr. DRACKETT: The rates from New York, Baltimore, Philadelphia and Boston in comparison with rates to Nashville.

Mr. BAXTER: To Chattanooga as compared with Nashville?

Mr. DRACKETT: Yes, sir.

Mr. BAXTER: In your trade in this territory do you compete in any degree with Knoxville in the drug business?

Mr. DRACKETT: Excepting when we go East we do not compete with Knoxville.

Mr. BAXTER: You do compete if you go in that direction?

Mr. DRACKETT: Yes, sir.

Mr. BAXTER: You do not compete with them in Georgia or Alabama?

Mr. DRACKETT: No, sir.

Mr. BAXTER: In Kentucky; do you sell in Kentucky?

Mr. DRACKETT: Yes, sir.

Mr. BAXTER: What is the rate from Chattanooga as compared with the rates from Knoxville, toward Chattanooga from the East?

321 Mr. DRACKETT: In meeting the Knoxville wholesale druggists we find that we are not compelled to sell goods at a loss to compete with them.

Mr. BAXTER: How near to Knoxville can you sell east?

Mr. DRACKETT: On the East Tennessee road we can go as far as Athens and Loudon.

Mr. BAXTER: Athens is about half way?

Mr. DRACKETT: We go beyond that; we go to Loudon.

Mr. BAXTER: That is within thirty miles of Knoxville?

Mr. DRACKETT: Yes, sir.

Mr. BAXTER: Do you know whether the rate from New York to Chattanooga is greater than from New York to Knoxville?

Mr. DRACKETT: I never looked into that.

Mr. POPE: I would like to ask if the rates to Rome or Gadsden—

if the rates to Chattanooga were reduced from eastern cities, assuming that they are now the same, and the rates were reduced likewise to Rome and Gadsden and other points with which he competes, whether his position in the selling of his goods would be improved?

Mr. DRACKETT: Since they are not competitive points and we are not at all bound by them in selling in that territory, it does not make any difference to us whether they be reduced or increased. The greatest difficulty is with Nashville and Memphis people, they being able to lay down goods—and goods are worth what it costs to lay them down—and the cost of their goods is very much less than ours.

Mr. POPE: I submit, Mr. Chairman, that the inquiry of the evidence is that there was a discrimination against Chattanooga by reason of this present adjustment of rates in favor of Nashville and Memphis. I submit that in so far as Nashville is concerned that it is a question of the combination of local rates wholly within the State of Tennessee, added, respectively, to the through rates to Chattanooga or to Nashville, that seems to cause the particular trouble in selling into that territory. I would like, sir, to submit that this is not a question, perhaps, for consideration before your body. The lines participating in the through rates, respectively, to Nashville and Chattanooga, are in no position to express an opinion as to local rates from Nashville and Chattanooga, as added to the through rates, that prevent or enable the Chattanooga merchant to enlarge the area of his territory.

322 Com'r BRAGG: That is matter of argument. You can present that in argument. Just let the facts come along and see what they are.

Com'r MORRISON: Are there any further questions?

Com'r BRAGG: Mr. Drackett, there is one question. You spoke about epsom salts and sulphur. Are there any other articles besides those where you encounter this competition?

Mr. DRACKETT: Yes, sir; there is brimstone, copperas, chalk, cream of tartar, etc. What we call heavy goods.

Com'r BRAGG: Give a list of them and let the stenographer take them down; or you can make a list of them and hand them to the stenographer.

Mr. DRACKETT: All right, sir; I will make the list and hand it to him.

Com'r MORRISON Make it out and give a copy to these other gentlemen, so that they can see it.

FILMORE GIBSON, a witness on behalf of the complainant, having been duly sworn, testified as follows:

Direct examination.

By Mr. DANIELLS:

Mr. DANIELLS: State your name, please.

Mr. GIBSON: Filmore Gibson.

Mr. DANIELLS: Where do you reside?

Mr. GIBSON: In Chattanooga.

Mr. DANIELLS: What is your business?

Mr. GIBSON: In the wholesale crockery business.

Mr. DANIELLS: With what firm are you connected?

Mr. GIBSON: With the Gibson and Loudon Manufacturing Company.

Mr. DANIELLS: State whether or not you sell your goods and compete for business in the same territory with Nashville and Memphis.

Mr. GIBSON: Yes, sir; we do.

Mr. DANIELLS: You can give the commission any fact in your knowledge showing any discrimination against Chattanooga in favor of Nashville and Memphis that you know of.

Mr. GIBSON: There is one class of goods to which I would like to call your attention. It is heavy goods, such as stoneware. It weighs four hundred pounds per hundred gallons. It is purchased north of the Ohio river, and the rate to Chattanooga is 52 cents and to Nashville 27 cents. The ware costs at the factory——

323 Com'r MORRISON: From what points?

Mr. GIBSON: From Zanesville, Ohio. That ware costs $4.00 per hundred gallons at the factory. A rate of 52 cents to Chattanooga would make it cost a little over six cents a gallon. The same ware laid down in Nashville would cost about five cents. That would permit Nashville to make a little over twenty per cent.

Then take the question of shipping cheap pottery from Trenton, N. J., which point, I think, enjoys the same rate as New York, Philadelphia and Baltimore, or a little less. A package of 1,000 pounds at Trenton would be worth $40.00. The rate to this point would be 65 cents, and I forget the classification to Nashville, but I think the rate is 48 cents. The value of this difference in rate to the Nashville man would be from three to five per cent., taking it for granted that the cost would be the same to the Chattanooga merchant as it would be to the Nashville merchant.

And the same classification exist- rigit through on all very bulky goods that are of small value, such as tinware, etc. Where the value is small and the packages large.

Mr. DANIELLS: Take tin plate shipped from New York to Chattanooga and to Nashville. what is the rate to Chattanooga, and what to Nashville?

Mr. GIBSON: I am not prepared to say positively what the rate to Nashville is. The last comparison I made showed that the rate was forty-five cents to Nashville and sixty-three cents to this point.

Com'r VEAZEY: Would that come over the same line of road to the two places?

Mr. GIBSON: I think it would, I have known that to be the case.

Com'r VEAZEY: Of course, there are different lines from New York to the two points that they could go over?

Mr. GIBSON: Yes, sir; there are several lines. There is only one line by which they could reach Nashville.

Mr. DANIELLS: To what line do you have reference?

Mr. GIBSON: To the East Tennessee.

Mr. CONNOR: If they came by several routes, would it be the same rate?

Mr. GIBSON: I understand that the rate is the same by all of the lines to Nashville. That is the case here.

Mr. DANIELLS: Can you tell what the rate is on glassware from Pittsburg to Nashville and Chattanooga over the same route?

324 Mr. GIBSON: We presume that the goods come over the same route. We pay ninety-two cents and Nashville pays fifty-two cents from Pittsburg.

Mr. DANIELLS: State whether or not you ever shipped goods through Chattanooga, say to Nashville, and had them returned here because you could get a better rate that way.

Mr. GIBSON: Yes, sir. We did on one occasion ship a car-load of very heavy iron goods from Jersey City that way. We bought them f. o. b. at Jersey City, and asked the manufacturer to get us the best rates he could. He telegraphed us that they had shipped the goods through to Nashville, and that they would return from Nashville here. That was done; they went through here and were returned to this point on the local rate from Nashville to Chattanooga. That was a saving to our concern in the neighborhood of $60 00 on one car.

Mr. DANIELLS: Well, now, on what route did that go? State whether or not that went through here in the first place.

Mr. GIBSON: My understanding is that they did go through here and were returned right back to Chattanooga.

Mr. DANIELLS: That saved you sixty dollars on the one car?

Mr. GIBSON: About that.

Mr. DANIELLS: Now if there are any other instances you can give the commission showing these discriminations, please do so.

Mr. GIBSON: I do not know any other instances of incoming freight.

Mr. DANIELLS: Tell the commission all you know on this subject.

Mr. GIBSON: There is another matter about which I would like to speak in regard to goods from Cincinnati and Louisville to points south of us. For instance, on stoves the same rate is made from Louisville to Guntersville, which I understand is from sixty-five to seventy miles south of us, that we have. They can get the same rate by shipping through Chattanooga to Guntersville. The rate from Louisville and Cincinnati is the same.

Mr. CLARKE: I ask leave to suggest for the purpose of saving time if the complaint is on rates from western points, and if it is not from eastern points. There is no use in taking up the time of the commission in hearing about rates from the West and North.

Mr. POPE: The complaint is from eastern seaboard cities and those cities are named. They are New York, Philadelphia,

325 Baltimore and Boston. There has been evidence in reference to rates from the West. There has been evidence in regard to rates from Zanesville, Ohio.

Mr. MOON: I think, if your honors please, it won't do any harm to give that.

Com'r MORRISON: It would be very convenient if everybody would agree that the testimony as far as applicable should be used. We sometimes do that. But if these gentlemen object, of course, it cannot be done.

Mr. CLARKE: There are some of us here who do not care to hear the other case. We desire to hear the petitions separately. Much the greater number of us are in that fix.

Mr. MOON: I suggest to your honors that the gentlemen need not complain of it if it assists the commission in getting all the facts.

Mr. CLARKE: These specific cities are named in this complaint.

Com'r MORRISON: We understand that, but we are very technical; we scatter a good deal. Have the case tried as it is presented.

Mr. DANIELLS: I believe that is all, Mr. Gibson.

Cross-examination.

By Mr. BAXTER:

Mr. BAXTER: Mr. Gibson, the first part of your testimony related to heavy earthenware. Is not that from the western part of the country, and not from New York, Baltimore and Philadelphia?

Mr. GIBSON: Yes, sir; that was from Zanesville, Ohio.

Mr. BAXTER: And a certain part related to rates from Pittsburg. That is not what is complained of here—the rate from Pittsburg to Chattanooga?

Mr. GIBSON: I do not know what the allegations were when the bill was filed by this body.

Mr. BAXTER: And another portion of your testimony was in reference to rates from the West; another portion in relation to rates from Liverpool to Guntersville. That has no bearing on the rates from Baltimore, Philadelphia and New York.

Mr. GIBSON: I gave that evidence in response to questions asking for it.

Mr. BAXTER: Do you handle pottery in your business from the East, from any of the eastern cities named?

Mr. GIBSON: This is one of the points the eastern men reach.

Mr. BAXTER: You referred to shipment you had made direct to Nashville and then returned to Chattanooga. How long since was that?

326 Mr. GIBSON: That was about a year ago; more than that, a year and a half.

Mr. BAXTER: Do you know whether or not the combination of the through from New York to Nashville and then the local rate from Nashville to Chattanooga could make any such difference as you speak of?

Mr. GIBSON: I did not know of that shipment until that was done.

Mr. BAXTER: You took the through rate to Nashville and then the local rate to Chattanooga?

Mr. GIBSON: I made no effort to do so.

Mr. BAXTER: You understood that you got your goods for sixty dollars less that was all is it? Do you know of your own knovledge that they went through Chattanooga?

Mr. GIBSON: I have stated that I did not.

Mr. BAXTER: You stated that the rate to Chattanooga upon a certain article was sixty-three cents and to Nashville forty-two cents?

Mr. GIBSON: About forty-two, I do not know what the classification is exactly.

Mr. BAXTER: Is it not a fact that the rate to Nashville is forty-two cents and to Chattanooga forty-nine?

Mr. GIBSON: I think not. Not unless it has been very recently changed.

Mr. BAXTER: You are stating it from recollection and not from the tariff sheets?

Mr. GIBSON: I have not examined the tariff sheets recently.

Mr. POPE: I would like to ask, do you deal in stoves, deal in them or manufacture them?

Mr. GIBSON: I do both.

Mr. POPE: Suppose the condition of rates was equal on stoves from eastern cities to the West, that is, the rate no higher on stoves from eastern seaboard cities to Chattanooga than to western points. Would it be to your interest to buy stoves in eastern markets?

Mr. GIBSON: Of course, that would be a question of the class of goods.

Mr. POPE: The average class of goods that is consumed in this market.

Mr. GIBSON: The class of goods consumed in this market is not made in the East.

Mr. CIST: I would like to ask the witness, where do you meet the Memphis competition about which you speak? All the evidence you have given relates to Nashville competition.

Mr. GIBSON: We go as far west as Decatur, usually

327 Mr. CIST: Do you then meet there Memphis merchants selling against you?

Mr. GIBSON: Yes, sir; they are selling within twenty-five miles of this city against us.

Mr. DANIELLS: That is all, Mr. Gibson.

J. P. SMART, witness on behalf of the complainant, having been duly sworn, testified as follows:

Direct examination.

By Mr. DANIELLS:

Mr. DANIELLS: Please state your name.

Mr. SMART: J. P. Smart.

Mr. DANIELLS: Where do you reside and what is your business?

Mr. SMART: I reside in Chattanooga, and my business is a boot and shoe merchant.

Mr. DANIELLS: State whether or not you are engaged both in the wholesale and retail trade.

Mr. SMART: Yes, sir; we are.

Mr. DANIELLS: Where do you buy most of your goods for your wholesale trade?

Mr. SMART: In Boston and around Boston, in its vicinity in Massachusetts.

Mr. DANIELLS: State whether or not you sell goods and compete for business in the same territory with Nashville and Memphis.

Mr. SMART: A portion of the same territory; yes, sir.

Mr. DANIELLS: Now, you may give the commission any facts within your knowledge tending to show any discrimination against Chattanooga and in favor of Nashville and Memphis merchants.

Mr. SMART: Well, I have not investigated the subject. I only know that there is a difference in rates. I understand that Nashville has a tariff less than it is to Chattanooga by perhaps twenty-three or twenty-four cents, and to Memphis it is twelve to thirteen cents less. I have been competing with them in the same territory and I understand there is that much difference in the tariffs.

Mr. DANIELLS: State whether or not it materially affects your trade in the territory where they compete?

Mr. SMART: Yes, sir. It gives them that much advantage.

Mr. DANIELLS: State whether or not you ever had occasion
328 to make through shipments, say from Boston, to points south that would give you better rates than you could get to Chattanooga.

Mr. SMART: Well, we have shipped some goods direct to points south of us where the parties would get the goods at that point at the through rate, instead of having the rate made from here, an additional rate from here, there.

Mr. DANIELLS: State whether you got the same rate there as to Chattanooga.

Mr. SMART: My understanding is that the rate is the same.

Mr. DANIELLS: Can you name any points to which you shipped?

Mr. SMART: The point to which we shipped them was Attalla, Ala.

Mr. DANIELLS: How far south?

Mr. SMART: Eighty miles south of us.

Mr. DANIELLS: State whether or not you got the same rate to Attalla as to Chattanooga.

Mr. SMART: I do not know as to how that is. I think it is. I think the rate to Gadsden is the same, and Attalia is only a few miles from Gadsden.

Mr. DANIELLS: Over what line of road do you ship mostly?

Mr. SMART: We have been shipping recently mostly by the Clyde line by way of Charleston.

Mr. DANIELLS: You ship over the East Tennessee, do you not?

Mr. SMART: Yes, sir; we ship a great many goods by that line but the bulk of our shipments have been coming by the Clyde line

Mr. DANIELLS: Where do you purchase most of goods for the retail trade?

Mr. SMART: In New York, Philadelphia, Cincinnati and Rochester, N. Y., and some in Baltimore.

Mr. DANIELLS: That is all for the present.

Cross-examination:

Mr. POPE: Do you deal in boots and shoes, Mr. Smart?

Mr. SMART: Yes, sir.

Mr. POPE: Your shipments are from Boston direct, I suppose?

Mr. SMART: Yes, sir.

Mr. POPE: What route do you reach by the Clyde line from Boston?

Mr. SMART: I will make an explanation of that; my partner has been attending to the wholesale business more than I have.

329 There are two lines of business, the wholesale and retail. I know that our shipments come by Charleston. I say the Clyde line because I had an impression that the Clyde line came to Charleston.

Mr. POPE: You buy by the quantity, I suppose? What is the average weight of a case of shoes, such as you handle?

Mr. SMART: I could not say just what the average is but I have an impression that it — about seventy pounds.

Mr. POPE: Is it more than eighty pounds?

Mr. SMART: I do not think so.

Mr. POPE: And the rate is one dollar and fourteen cents to Chattanooga that you pay?

Mr. SMART: Yes, sir.

Mr. POPE: And it is ninety-one cents to Nashville?

Mr. SMART: Yes, sir.

Mr. POPE: A difference of twenty-three cents. On an average of eighty pounds to the case that would be about ninety-one cents to Chattanooga, and the same calculation would make it about seventy-three cents to the Nashville trade per case. How many pairs of shoes are there to the case, sixty or fifty?

Mr. SMART: It used to be sixty, but they are making them less now; they do not average sixty. We have a great many of thirty-six, twenty-four and twelve pair cases. It used to be that there were sixty pairs to the case.

Mr. POPE: There would be a difference of eighteen cents a case; that would be three-tenths of a cent per pair. Is that enough, sir, to affect or deprive you of the territory that is open to Nashville by the lower rate?

Mr. SMART: Yes, sir, I think so; but I think the argument is worth — than the actual fact.

Mr. POPE: I am only trying to get at the facts as damaging your trade.

Mr. SMART: I suppose that is comparatively correct then.

Mr. DANIELLS: You do make shipments over the East Tennessee up to this time, do you not?

Mr. SMART: Oh, yes, a portion of our goods come that way all the time.

Mr. BAXTER: You say that your shipments are by way of Charleston and you assume that the Clyde line brings them to Charleston. Do you know whether or not there is a direct steamer line from Boston to Charleston?

Mr. SMART: My impression is that those steamers come from New York; the goods I think first come from Boston to New York, and then from New York to Charleston.

330 Mr. BAXTER: And break the loads at New York and reload to Chattanooga?

Mr. SMART: I think so. They may be brought by railroad to New York.

Mr. BAXTER: And then break bulk at New York and load it into the steamer and brought to Charleston?

Mr. SMART: Yes, sir.

Mr. BAXTER: Assuming that the rate from Boston to Chattanooga is one dollar and fourteen cents and to Nashville ninety-one cents; do you know any reason why it is you ship in the way you spoke of? Did you get any less rate than a dollar and fourteen to Chattanooga?

Mr. SMART: The reason we ship by that line is that they make the best time.

Mr. BAXTER: It is a matter of time then?

Mr. SMART: Yes, sir. But we ship more or less goods by the railroads all the time.

Mr. BAXTER: It has not been a matter of rate then?

Mr. SMART: No, a matter of time. They make better time than we have ever gotten by any line.

Mr. DANIELLS: Can you arrive at any conclusion as to what you lose per year by reason of this discrimination?

Mr. SMART: No, sir; I have never made any calculation about that.

Mr. DANIELLS: Could you approximate it?

Mr. SMART: Well, I suppose it would amount to something between $500.00 and *a* $1,000.00 in freight every year.

Mr. CLARKE: You say that these drummers from Nashville go around and blow about the rates to Nashville. Now, if you get into a territory of a city which happened to have a little higher rate than you, then your drummers would use the same racket, would not they?

Mr. SMART: Yes, sir; the same thing.

Mr. DANIELLS: That is all, Mr. Smart.

Com'r MORRISON: Call another gentleman.

D. B. LOVEMAN, a witness on behalf of the complainant, having been duly sworn, testified as follows:

By Mr. DANIELLS:

Mr. DANIELLS: Mr. Loveman, in what business are you engaged?

Mr. LOVEMAN: In the dry goods business.

Mr. DANIELLS: Wholesale and retail?

Mr. LOVEMAN: Mostly retail.

331 Mr. DANIELLS: In what territory do you sell?

Mr. LOVEMAN: In all the Southern States.

Mr. DANIELLS: Do the Nashville merchants and Memphis merchants compete with you in your territory?

Mr. LOVEMAN: Yes, sir.

Mr. DANIELLS: In what territory do they compete?

Mr. LOVEMAN: Well they come in in the middle and western part of Tennessee, north Georgia, Alabama and Mississippi.

Mr. DANIELLS: Is there any discrimination in rates against Chattanooga in favor of Nashville and Memphis from eastern seaboard points?

Mr. LOVEMAN: Yes, sir.

Mr. DANIELLS: Now state to the commission any facts you know in regard to discrimination against Chattanooga merchants.

Mr. LOVEMAN: Well, we understand that the Nashville rate on first-class freight is ninety-one cents whereas ours is $1.14. There is a difference of about ten or eleven cents on each of the other classes.

Mr. DANIELLS: That is upon goods brought from the eastern seaboard cities to Chattanooga and Nashville over the same roads?

Mr. LOVEMAN: Yes, sir.

Mr. DANIELLS: Well, if there is any instance in any particular line of your trade you may illustrate it to the commission.

Mr. LOVEMAN: Well, I am a large buyer of goods of what is called first-class freight which pays $1.14 to Chattanooga and ninety-one cents to Nashville which makes it nearly twenty-five per cent. more expense to carry on my business as regard freight than it costs the Nashville merchants. I frequently fill orders for Nashville and Atlanta merchants, and have the goods shipped to Nashville over the East Tennessee road. I frequently get the rate of freight for the three points and invariably get a lower rate to Nashville than to Chattanooga over the same line of road. Whenever I am in New York friends in Nashville send orders to me and get me to ship the goods.

Mr. DANIELLS: Can you state about how much trade is damaged by reason of this discrimination?

Mr. LOVEMAN: Taking the same line of business, say that the Nashville man does the same amount of business that I do, then he would have the advantage of me from $1,500.00 to $2,000.00 in the matter of freight alone. I pay about $7,000.00 in freight and the Nashville man would have to pay from 25 to 30 per cent. less on the same line of goods.

Mr. DANIELLS: That is all.

332 Cross-examination.

By BAXTER:

Mr. BAXTER: What portion of your business is wholesale?

Mr. LOVEMAN: A very small portion.

Mr. BAXTER: Practically all retail?

Mr. LOVEMAN: The largest portion is retail.

Mr. BAXTER: What character of business are you engaged in generally?

Mr. LOVEMAN: I do not know that I understand the question.

Mr. BAXTER: You know what I mean. What kind of business do you do?

Mr. LOVEMAN: It is dry goods, carpets, and notions; that is all covered by the term "dry goods."

Mr. BAXTER: Do you know what proportion of the Nashville tonnage from those eastern seaboard points is done over the East Tennessee, Virginia and Georgia Company?

Mr. LOVEMAN: No, sir; I do not know what proportion comes over that road. I know that I have shipped to Nashville over the East Tennessee road and my friends ship to Nashville over the East Tennessee.

Mr. BAXTER: You do not know what portion of the goods come via Cincinnati and the river—coming this way?

Mr. LOVEMAN: I know the rate is the same and I know the goods are shipped over the East Tennessee through Chattanooga to Nashville.

Mr. BAXTER: What quantity or to what extent you have no idea?

Mr. LOVEMAN: I do not know anything about the railroad business. I would say, if you will permit me, that it is the same over all routes. If a shipper desires to ship all his goods over the East Tennessee he can do so.

Mr. BAXTER: To Nashville?

Mr. LOVEMAN: Yes, sir; if I were living in Nashville I could ship by Savannah at the same rate as by the New York Central.

Mr. POPE: Mr. Loveman, about what amount of your business is in what is called the "cotton piece goods;" the various articles denominated in the special list sheet? About what is the amount of the business?

Mr. LOVEMAN: It is very difficult to give that, Mr. Pope.

Mr. POPE: Is it a large or small proportion?

333 Mr. LOVEMAN: Well, in the retail department it is small; a wholesale merchant would have a large proportion.

Mr. POPE: Do you not do a package business?

Mr. LOVEMAN: Not much.

Mr. POPE: Your rate is a dollar and fourteen cents on first class goods against ninety-one cents to Nashville. But if you are handling cotton piece contained in that list, all the fabrics made of cotton called "cotton piece goods," containing either a large amount of cotton or made wholly of cotton, shipped in the original packages, which comes from the eastern seaboard, that is in the fifth class with the Southern Railway and Steamship Association classification which is used into Chattanooga, and the rate is sixty cents, is it not?

Mr. LOVEMAN: Sixty or sixty-eight.

Mr. POPE: Is not fifth class sixty cents?

Mr. LOVEMAN: Yes, sir.

Mr. POPE: Now, when this business goes to Nashville, these same cotton piece goods, from eastern cities, a different classification is used, that is the trunk-line classification, the official classification, and cotton piece goods under that classification is third class and the rate is sixty cents. I simply have wanted to show that the rate on certain cotton piece goods was the same to Chattanooga as to Nashville.

Mr. MOON: Is the attorney testifying?

Mr. LOVEMAN: The goods that I handle are largely first-class.

Mr. CIST: Following about the same line I would like to ask you a question or two. In retail business you do not meet the competition of Nashville merchants of course; it is only in your wholesale business that you are affected by the Nashville business; is not that so?

Mr. LOVEMAN: In the retail business the matter of freight can only be figured in the general results. For instance, I have figured up my freight account — I find that I am at a disadvantage as compared with the Nashville and Memphis merchants on account of the difference in rates.

Mr. CIST: Simply on account of the rates?

Mr. LOVEMAN: That is all.

Mr. CIST: You do not find that the Nashville retail merchants compete with you for your retail trade?

Mr. LOVEMAN: Yes, sir; they compete for our retail trade. We do a large retail business all over this country. The prices are practically the same all over this territory. It only enters into the profits.

Mr. CIST: It is not felt, then, in the wholesale business?

334 Mr. LOVEMAN: It would be felt more in the wholesale business.

Mr. CIST: Is it not a fact that the greater portion of your wholesale business is done in what is known as these "cotton piece goods"?

Mr. LOVEMAN: Not the greater portion. I should judge one-third of the merchandise of the wholesale merchant would be classified as cotton piece goods.

Mr. CIST: Well, just in the same way approximate the other two-thirds.

Mr. LOVEMAN: One-third would consist of fine goods, such as notions, it would pay $1.14; the other one-third would be southern factory goods.

Mr. CIST: So that of the two-thirds that do enter into this contest, one of the thirds, that is, one-half of it, takes a lower rate than to Nashville.

Mr. LOVEMAN: Of the goods that come from the East one-half would be cotton piece goods and the other half first-class goods. My business is very little in the wholesale line.

Mr. MOON: Your profits are affected both in the retail and in the wholesale business, are they not?

Mr. LOVEMAN: Yes, sir; because of the increase of the cost of conducting our business.

Mr. MOON: About what amount on your wholesale business?

Mr. LOVEMAN: From $1,500.00 to $2,000.00.

Mr. CLARKE: You arrive at that by taking the difference in the freight rate to Nashville and to this point?

Mr. LOVEMAN: Yes, sir.

Mr. CLARKE: Then, if Cincinnati happened to have a rate that was higher than yours, then to the extent they came into competition with you they would make a less profit?

Mr. LOVEMAN: I suppose so.

Com'r MORRISON: Judge Moon, you inquired about taking a recess, I believe?

Mr. MOON: Any time would suit me that is convenient for the commission.

Com'r MORRISON: We will take a recess until half past two.

After recess.

After the expiration of the recess (2.30 p. m.) the commission resumed its session.

Com'r MORRISON: Gentlemen, are you ready to proceed?

Mr. DANIELLS: Yes, sir; we are ready.

335 J. M. TRIGG, a witness on behalf of the complainant, having been duly sworn, testified as follows:

Mr. DANIELLS: Do you live in Chattanooga?

Mr. TRIGG: Yes, sir.

Mr. DANIELLS: In what line of business are you engaged?

Mr. TRIGG: In the wholesale grocery business.

Mr. DANIELLS: State whether or not you sell you- goods in the same territory that Nashville and Memphis merchants do.

Mr. TRIGG: Yes, sir; we compete for trade in the same territory. We sell goods in the Memphis territory and in the Nashville territory, but we are restricted to a certain extent because they can obtain better rates there. On heavy groceries it is impossible to sell in the Memphis territory, but on the finer goods, where we have better profits, we can get in occasionally.

Mr. DANIELLS: Without being asked questions, just go on, please, and state such facts that you know which will be of benefit to the complainant.

Mr. TRIGG: Last year our traveling agent was in Adairsville. We were trying to sell canned goods there, and they were offering them from Memphis cheaper than we could lay them down in Chattanooga. The rate from Baltimore to Memphis on canned goods is much better than to Chattanooga. The rate to Memphis is thirty-five cents, while the same class of goods to Chattanooga is seventy cents, which is double. That excluded us from that territory. Guntersville we usually control, as we consider that in our territory. On sugars and goods of that kind the difference in the rates amounts to a profit. For instance, we pay forty-nine cents, while Nashville pays thirty-one; the difference is a profit.

Mr. DANIELLS: Over what route do you ship?

Mr. TRIGG: We ship the majority of our goods by way of the Ocean Steamship Company of Savannah.

Mr. DANIELLS: Do you ship any by the East Tennessee?

Mr. TRIGG: Yes, sir.

Mr. DANIELLS: To any considerable extent?

Mr. TRIGG: Yes, sir; we ship a good many goods over the East Tennessee, but the majority comes by the ocean steamship companies.

Mr. DANIELLS: How does it go to Memphis?

Mr. TRIGG: My impression is that it goes over the East Tennessee.

Mr. DANIELLS: From here to Memphis?

Mr. TRIGG: I do not exactly understand.

336 Mr. CONNOR: How does freight go from Chattanooga to Memphis? Over what road?

Mr. TRIGG: Over the Memphis and Charleston.

Mr. DANIELLS: Do you buy goods also at Boston and New York?

Mr. TRIGG: Yes, sir.

Mr. DANIELLS: And over what line do you ship from there?

Mr. TRIGG: Sometimes by the East Tennessee and sometimes by the Ocean Steamship Company; occasionally over the Baltimore and Ohio to Cincinnati, and from there here.

Mr. DANIELLS: Have you made any computation of the difference it would amount to yearly in the amount of freight you pay here as against what it would be, if anything, at the Nashville rate, as if you were doing business in Nashville and did the same business yearly as you do here?

Mr. TRIGG: No, sir; I have never figured on the cost, but I could tell by our sales. It amounts to considerable.

Mr. DANIELLS: State whether it is considerable or not.

Mr. TRIGG: Yes, sir; it is considerable.

Mr. DANIELLS: State whether or not this discrimination against you materially affects your business and your profits.

Mr. TRIGG: Yes, sir; it does. We have to compete with Nashville and Memphis in that territory, and they come into our territory and compete for our trade. What I mean by our territory is the towns adjacent to Chattanooga, and Memphis territory is found closer to that city. In other words, they can sell goods at our door and they exclude us to a certain extent.

Mr. DANIELLS: How far along the Memphis and Charleston do you sell?

Mr. TRIGG: As far along as Florence, Decatur, South Pittsburg, all on the Nashville branch.

Mr. DANIELLS: Can you realize as large a profit on your goods as the Memphis and Nashville merchants do in those places?

Mr. TRIGG: At Florence we are almost excluded on sugar and that class of goods. We sell tobacco and that class of goods by selling them cheaper and taking less profit than they do at Nashville. This is the only way we can sell them.

Mr. DANIELLS: As a matter of fact, part of your trade you can not carry on at all by reason of the discrimination?

337 Mr. TRIGG: No, sir; not if the merchants are well posted.

Mr. DANIELLS: If you know anything further you may state it to the commission.

Mr. TRIGG: I know nothing further.

Cross-examination:

Mr. BAXTER: What articles are usually denominated as staple groceries?

Mr. TRIGG: Sugar, coffee, rice, tobacco and articles of that kind.

Mr. BAXTER: Where do you make those purchases usually for your house?

Mr. TRIGG: We buy coffee from New York usually; sugar we buy from Philadelphia and New Orleans.

Mr. BAXTER: Do you buy any coffee in New Orleans?

Mr. TRIGG: No, sir; we very rarely ever buy any there.

Mr. BAXTER: Is it not a fact that staple groceries are sold on a narrower margin than other groceries?

Mr. TRIGG: Yes, sir.

Mr. BAXTER: By everybody?

Mr. TRIGG: Yes, sir.

Mr. BAXTER: Everywhere?

Mr. TRIGG: Yes, sir.

Mr. BAXTER: Do you not purchase your sugar and molasses, staple groceries of that kind, entirely from the southern territory, from New Orleans?

Mr. TRIGG: No, sir; I do not.

—. BAXTER: About what proportion do you purchase South?

Mr. TRIGG: Sugars, during the last year or two, the largest have been bought in New Orleans. We buy very few syrups in New Orleans.

Mr. BAXTER: Do you know what the rate from New Orleans to Chattanooga is on sugar and molasses?

Mr. TRIGG: Nineteen cents, I think, on sugar.

Mr. BAXTER: What to Nashville?

Mr. TRIGG: I do not know.

Mr. BAXTER: Is it higher or lower?

Mr. TRIGG: I really do not know, sir.

Mr. BAXTER: Do you know what the rate is from Boston to Chattanooga upon sugar and molasses?

Mr. TRIGG: From Philadelphia—we do not buy any in Boston. Forty-six cents from Philadelphia I think is the rate. Forty-nine cents from New York and forty-six cents from Philadelphia.

338 Mr. BAXTER: Mr. Trigg, are you sufficiently informed to make an estimate or statement as to what proportion of the entire business of Chattanooga is done from the East or from other portions of the country into Chattanooga and out of it?

Mr. TRIGG: No, sir; I am not.

—. BAXTER: Do you know what proportion of it is done with reference to the grocery trade in the line in which you deal?

Mr. TRIGG: Well, strictly groceries, leaving out flour and meat, it would be over half, I should think.

Mr. BAXTER: Well include flour and meat; the entire grocery business; what proportion is done from the East as compared with other portions of the country?

Mr. TRIGG: I could not say in regard to that exactly.

Mr. BAXTER: I mean in regard to your own business?

Mr. TRIGG: Well, I suppose about one-third.

Mr. BAXTER: One-third from the East and two-thirds from other portions of the country. Well, is there any complaint to make, so far as you know, of the rates from the portion of the country from which two-thirds of the business is done into Chattanooga, is there any complaint at all?

Mr. TRIGG: Yes, sir.

Mr. BAXTER: State that then.

Mr. TRIGG: Well, take freight rates from the West. We have our flour shipped to us from Princeton, Indiana, and we pay thirty-eight cents for it. Now, every little station gets a rate of thirty-nine cents from the same point, one cent higher than we pay. We ship right through here and pay thirty-nine cents to Rising Fawn, while we pay thirty-eight cents to Chattanooga.

Mr. BAXTER: Rising Fawn is further from Indiana than Chattanooga, is it not?

Mr. TRIGG: Yes, sir; it works against us in both ways. We pay a higher rate coming in than our competitors and they get a cheaper rate to almost all points.

Mr. BAXTER: Please explain that statement by an example of paying higher rates in and higher rates out.

Mr. TRIGG: We pay higher rates from the East to Chattanooga and then to the points that we ship to they get better rates than we do. Thus it restricts us from selling goods in our territory because they have a cheaper rate of freight. For instance if we shipped a car-load of flour to Chattanooga it would cost us thirty-eight cents and that would restrict us from shipping out of this place as these smaller places would get the same rate there except one cent.

Mr. BAXTER: And then your statement of paying higher
339 rates in and out is in reference to that state of facts, is it?

Mr. TRIGG: Yes, sir.

Mr. BAXTER: I have nothing further.

Mr. CONNOR: Please tell the commission what would be the rate you would have to pay to Fort Payne.

Mr. TRIGG: I think it is twelve cents a hundred.

Mr. CONNOR: Then flour would cost the customer if it came here and was reshipped fifty cents a hundred?

Mr. TRIGG: Fifty cents a hundred.

Mr. CONNOR: But if they got it direct from Princeton it would only cost them thirty-nine cents.

Mr. TRIGG: Thirty-nine cents. The only way we can sell is to ship it to them and have the bill sent to us.

Mr. BAXTER: Would not that same condition of things exist at Nashville? Would it not be the through rate plus the local?

Mr. TRIGG: I understand they have reshipping facilities there.

Mr. BAXTER: Do you know that of your own knowledge?

Mr. TRIGG: No, sir; I do not.

Mr. CLARKE: You speak now of the rate down here in Alabama. You say the rate to this point is thirty-eight cents and down there is thirty-nine; and that if you ship direct to the place where you sell, it is only one cent more. The complaint you make is that the roads do not charge higher enough down there.

Mr. TRIGG: We have no rebilling facilities, and a great many towns do have rebilling facilities. For instance, they ship a carload of goods to town and then they can reship it at the same rate, while we are restricted, not having that privilege.

Mr. CLARKE: What *do you* complain of then is that you cannot ship to Rising Fawn because you have to ship here and then pay the local rate to that point?

Mr. TRIGG: It restricts us from doing business simply because we pay a higher and other places have a cheaper rate than we have.

Mr. CLARKE: I believe we have gotten off on western freight again.

Com'r MORRISON: That was in response to a question asked by Mr. Baxter.

Mr. BAXTER: That same condition of affairs would apply to Birmingham if you wanted to sell there; the rate to Chattanooga and then from Chattanooga to Birmingham would prevent you from selling in Birmingham?

Mr. TRIGG: I suppose so.

340 Mr. POPE: When you thus shipped direct from Princeton to Rising Fawn is it not a sale and does not your house get a commission out of that?

Mr. TRIGG: Yes, sir. But the point is this: sometimes we can do that but that gives them an advantage over us. If they are well informed they are going to buy direct. It restricts our business right here in our own territory.

Mr. BAXTER: Then the manufacturing man becomes a competitor with you, the middle man?

Mr. TRIGG: Yes, sir, that is the trouble.

Com'r BRAGG: Do we understand you to say that Memphis and Nashville have what we call rebilling privileges?

Mr. TRIGG: I do not know positively that they have now; they did have until recently.

Com'r BRAGG: By recently, how long ago do you mean that was?

Mr. TRIGG: I think it has been within the last six months.

Com'r BRAGG: Do you understand that it applies to anything else except flour?

Mr. TRIGG: It may apply only to western goods.

Com'r BRAGG: That does not apply to any of the goods that you get from eastern points?

Mr. TRIGG: I think not, sir.

Mr. DANIELLS: It is a fact that in shipping these goods from New York and Boston they ship them right through here to Nashville at a less rate than to Chattanooga?

Mr. TRIGG: I believe so.

Mr. DANIELLS: That is all.

Mr. DANIELLS: Mr. Gibson, we want to recall you for a moment.

FILMORE GIBSON, a witness on behalf of the complainant, was recalled and testified as follows:

Mr. DANIELLS: Have you made any computation as to the amount of freight you pay yearly?

Mr. GIBSON: Yes, sir.

Mr. DANIELLS: Supposing now that you were doing business in Nashville and received the same amount of goods that you received here in your business, and paid the Nashville rates instead of the Chattanooga rates what would be the difference in the amount of freight charges paid in a year?

Mr. GIBSON: There would be a difference of about $3,500.00.

Mr. DANIELLS: Why is that?

341 Mr. GIBSON: Because of the increased amount charged Chattanooga for the same class of goods.

Mr. DANIELLS: Discrimination against Chattanooga in favor of Nashville?

Mr. GIBSON: Yes, sir.

Mr. DANIELLS: You may have the witness.

Mr. CIST: I would like to ask a question or two. Mr. Gibson, you are a manufacturer of stoves, are you not?

Mr. GIBSON: Yes, sir.

Mr. CIST: That constitutes the principal part of your business?

Mr. GIBSON: No, sir.

Mr. CIST: What does?

Mr. GIBSON: We manufacture goods to some extent and have a wholesale house of crockery, glassware, and a general line of toys, etc.

Mr. CIST: Do I understand that that is your business?

Mr. GIBSON: The Gibson Manufacturing Company are manufacturers and merchants.

Mr. CIST: But the greater part of the business is in merchandise and not in manufactures?

Mr. GIBSON: Yes, sir.

Mr. CIST: Now you speak of the fact that if you were located in Nashville the difference in your favor in freights would be about $3,500.

Mr. GIBSON: Yes, sir.

Mr. CIST: I would like to know what proportion of your business that would cover?

Mr. GIBSON: That covers the entire business.

Mr. CIST: I do not mean that. On how large a business does that cover?

Mr. GIBSON: That applies to a line of business as compared with the same line we would have to do in Nashville.

Mr. CIST: On how much business? One hundred thousand, two hundred thousand, or three hundred thousand dollars?

Mr. GIBSON: On about a $160,000.00.

Mr. CIST: Well, now, if you were located in Cincinnati the difference would be still more would it not?

Mr. GIBSON: I do not know that we could reach the same territory on small quantities if located there.

Mr. CIST: The fact is, if you were in any city which was better located as to rates the difference would be still more?

Mr. GIBSON: If we were also located as conveniently to the territory that we now do business in, that might be.

Mr. CIST: That is all.

342 Com'r MORRISON: If there anything further with this witness?

Mr. DANIELLS: We are through with him.

I. B. MARIAN, a witness on behalf of the complainant, having been duly sworn, testified as follows:

Mr. DANIELLS: Do you live in Chattanooga, Mr. Marian?

Mr. MARIAN: Yes, sir.

Mr. DANIELLS: Engaged in the wholesale grocery business?

Mr. MARIAN: Yes, sir.

Mr. DANIELLS: Now you may state to the commission what you know about the discrimination in the matter of freight rates against Chattanooga?

Mr. MARIAN: On eastern freight?

Mr. DANIELLS: Yes, sir.

Mr. MARIAN: Well, it is about fifty per cent. on sixth-class freight between freights shipped between New York, Philadelphia, Boston to Chattanooga and Nashville. The rate on coffee and sugar is forty-nine cents to Chattanooga and thirty-three cents to Nashville shipped over the same line.

Mr. DANIELLS: Shipped through here?

Mr. MARIAN: Yes, sir.

Mr. DANIELLS: Now do you compete for business in the same territory as Nashville?

Mr. MARIAN: Yes, sir. We travel towards Nashville about one-third of the way.

Mr. DANIELLS: State to what extent that interferes with your business and profits?

Mr. MARIAN: Well, they can ship sugar from New York to Nashville and bring it back into our territory and sell as cheaply as we can here, but we cannot go into their territory at all.

Com'r MORRISON: How do you divide what you call your territory from what you call their territory?

Mr. MARIAN: On this Nashville road out from Chattanooga. They can come in on the Memphis and Charleston railroad.

Com'r MORRISON: Do you call your territory all the territory that is nearer to Chattanooga than to Nashville?

Mr. MARIAN: Yes, sir.

Com'r MORRISON: And all that is nearer to Nashville than to Chattanooga you call Nashville territory, is that it?

343 Mr. MARIAN: Yes, sir.

Mr. DANIELLS: You say they can ship through Chattanooga, and bring it back into our territory?

Mr. MARIAN: Yes, sir; but we cannot do anything in their territory at all.

Mr. DANIELLS: If you know any other facts please give them to the commission.

Mr. MARIAN: On cigars and the class which comes mostly from the East they pay ninety-one cents and we pay $1.14; but heavy goods is where they hurt us the most.

Mr. DANIELLS: Over what line do you ship mostly?

Mr. MARIAN: Over the East Tennessee road. It is a little the quickest route. That is considered the best route for us.

Mr. DANIELLS: Now, can you tell about how much you are injured each year by reason of this discrimination?

Mr. MARIAN: Yes, sir; I can tell very close to that. Our freight amount- to over $12,000.00 a year, and the discriminations from the West are about the same in favor of Memphis and Nashville as from the East. In our whole business—I cannot tell exactly how much is from the East, but I think about one-third of our business—and we are discriminated against the same from the West, so that the whole makes about three thousand dollars' difference in our business on account of the discrimination.

Mr. DANIELLS: That is, that much taken from your profits?

Mr. MARIAN: There is no doubt about that at all.

Mr. DANIELLS: You can take the witness, gentlemen.

Cross-examination.

Mr. BAXTER: What proportion of your business is done from the West do you judge?

Mr. MARIAN: About two-thirds.

Mr. BAXTER: And one-third from the East?

Mr. MARIAN: Yes, sir.

Mr. LAWTON: Do you know as a matter of fact that this business comes through Chattanooga that goes through Nashville?

Mr. MARIAN: A large portion of it does.

Mr. LAWTON: Does not the larger portion come the other way by the all-rail line?

Mr. MARIAN: I think not.

Mr. LAWTON: Have you ever investigated the subject to find it out?

344 Mr. MARIAN: I only know from what I have heard through railroad men.

Mr. LAWTON: Do you not know as a matter of fact, that Nashville is nearer New York, Washington and Baltimore than Chattanooga?

Mr. MARIAN: No, sir; I do not know it. I guess it is not.

Mr. LAWTON: It is not nearer to Baltimore?

Mr. MARIAN: No, sir. Chattanooga is nearer Baltimore by railroad or by any other line.

Mr. LAWTON: Are you certain of that?

Mr. MARIAN: I know it.

Mr. LAWTON: Mr. Marion, when you speak about the difference in freight rates and discrimination, you mean by discrimination that rates are higher, do you not? If you go still further off from New York and did business from New York, of course your freight to that point will be still higher, would it not?

Mr. MARIAN: It is not so in this case. Nashville is further from New York than we are, and it gets lower rates.

Mr. LAWTON: Well, suppose you got considerably further off? Do you know as a matter of fact that the rate to Atlanta is the same as to Chattanooga?

Mr. MARIAN: There is not much difference in distance.

Mr. LAWTON: Does not some of the Atlanta freight come through Chattanooga?

Mr. MARIAN: I think not.

Mr. LAWTON: When it comes over the East Tennessee, does it not?

Mr. MARIAN: It comes up from Charleston and those points.

Mr. LAWTON: The East Tennessee does not haul it through Charleston; I mean the East Tennessee to Atlanta?

Mr. MARIAN: They may do so; I suspect they do; but I should think the most of it would come by way of Savannah.

Mr. LAWTON: Do you not know that many of the defendants do an all-rail business to Atlanta?

Mr. MARIAN: I do not know.

Mr. LAWTON: Do you know that the rates are the same to Atlanta as to Chattanooga?

Mr. MARIAN: I think so.

Mr. LAWTON: No matter which way they go?

Mr. MARIAN: I suppose so.

Mr. LAWTON: Macon is less?

345 Mr. MARIAN: It is only a small difference; there is only one hundred miles between the two places, you know.

Mr. LAWTON: Now, does not, as a matter of fact, freight come through Chattanooga to Atlanta and pay the same rates to this point as to Atlanta?

Mr. MARIAN: They may get some freight that way.

Mr. LAWTON: You do not consider that discrimination?

Mr. MARIAN: It goes into a different territory entirely.

Mr. CIST: Do you get any sugar from New Orleans?

Mr. MARIAN: Yes, sir.

Mr. CIST: As a matter of fact, do you not pay the same rate on sugar brought from New Orleans to Chattanooga that Nashville does?

Mr. MARIAN: I do not. I think Nashville pays ten or thirteen and we pay nineteen cents for hundred-barrels lots here. They get a rate of two-thirds of what we do.

Com'r MORRISON: Anything further, gentlemen?

Mr. DANIELLS: We have a map there, if the commission pleases, if you desire to look at the different routes surrounding this place.

Com'r MORRISON: We are quite well acquainted with them from previous cases.

Mr. CLARKE: What do you say, that you ought to have the same rate as Nashville?

Mr. MARIAN: We want the same rate as Nashville; yes, sir.

Mr. DANIELLS: That is all.

W. O. PEEPLES, a witness on behalf of the complainant, having been duly sworn, testified as follows:

Mr. DANIELLS: You reside in Chattanooga?

Mr. PEEPLES: Yes, sir.

Mr. DANIELLS: What is your business?

Mr. PEEPLES: Wholesale groceries.

Mr. DANIELLS: Now, you may give the commission the benefit of any facts you may have that bears upon the questions under investigation.

Mr. PEEPLES: Well, I suppose it is in regard to eastern freight particularly.

Com'r MORRISON: Yes, sir; that is what we are inquiring about.

Mr. PEEPLES: It has been my understanding that freights are a great deal higher to Chattanooga than to Nashville. There
346 is no question about that. As has been stated here the rates are forty-nine cents from Philadelphia and New York to Chattanooga and it would be thirty-eight cents to Nashville going right through here. We do a considerable business. I believe our business now amount- to about one-half million dollars a year, and I suppose about one-third of our entire business comes over the eastern line—goods we buy and sell. I take it, it is about one-third of our business that comes over eastern lines and the balance comes from the West. We are discriminated against in both places. I think that the discrimination against our firm, would amount to four or five thousand dollars a year.

Com'r MORRISON: You mean loss both ways?

Mr. PEEPLES: Yes, sir; I mean both ways.

Mr. DANIELLS: Do you sell in the same territory as Nashville merchants?

Mr. PEEPLES: We would if we could. We cannot go half way to Nashville or to Memphis on account of the discrimination. Memphis and Nashville get a lower rate of freight in there, as I understand it, and they have a lower rate of freight out of there.

Mr. DANIELLS: Now, at this time about one-third of your goods come from the East?

Mr. PEEPLES: Yes, sir.

Mr. DANIELLS: Was there ever a time you received a greater portion from the East?

Mr. PEEPLES: Well, no, sir. We handle soap and candles and everything of that kind, and those things generally come from the

West, and a great many things of that kind we get from the West. I suppose about one-third come from the East.

Mr. DANIELLS: In the last year or year and a half you have been getting sugar from New Orleans?

Mr. PEEPLES: Yes, sir; during the last year we got some from New Orleans. We got all of it from the East up to a year ago.

Mr. DANIELLS: Now, is that true as to anything else?

Mr. PEEPLES: I do not believe there is anything else.

Mr. DANIELLS: About how much sugar do you sell in a year?

Mr. PEEPLES: Well, we sell now and have been selling for the last twelve months from two to four car-loads of sugar a month.

Mr. DANIELLS: You may state now about what proportion your sugar trade bears to your entire business?

Mr. PEEPLES: I would simply have to figure that out.

Mr. DANIELLS: Can you state whether it is small or great?

347 Mr. PEEPLES: It is considerable; the sugar business is considerable of an item.

Mr. DANIELLS: I mean with reference to all your other business?

Mr. PEEPLES: That would amount to four or five thousand dollars a month.

Mr. DANIELLS: And your entire business amounts to about half a million a year?

Mr. PEEPLES: It is running that way now—since about last June or May—about a half million a year.

Mr. DANIELLS: You may take the witness.

Cross-examination:

Mr. POPE: Why did you buy sugar in New Orleans in the last year and a half?

Mr. PEEPLES: Because we could get lower prices; we buy wherever we can get the lowest prices.

Mr. POPE: Therefore you buy in New Orleans now?

Mr. PEEPLES: Yes, sir.

Mr. POPE: What rate do you pay from New Orleans?

Mr. PEEPLES: Nineteen cents for car-loads and twenty-one cents for less than car-loads.

Mr. POPE: The rest of your groceries—the bulk of your groceries, where are they bought?

Mr. PEEPLES: The bulk of our groceries is bought in the East.

Mr. POPE: Of what do they consist?

Mr. PEEPLES: Coffee and canned goods. We buy some canned goods from the West, however. We buy some soaps in the East, though most of them in the West, and we buy a great many different things. I hardly know——

Mr. POPE: It is a variety of articles you buy from the East?

Mr. PEEPLES: Yes, sir. We buy all our cigars from the East, etc.

Mr. POPE: Is the bulk of the tonnage from the East or West?

Mr. PEEPLES: I have stated that two-thirds was from the West.

Mr. POPE: And your sugars are from New Orleans? Where do you buy rice, in the Carolinas?

Mr. PEEPLES: Yes, sir; we buy sometimes in the Carolinas.

Mr. POPE: Do you buy syrups in New Orleans or in the East?

Mr. PEEPLES: In the East.

348 Mr. POPE: That is refined syrups; how about crude molasses?

Mr. PEEPLES: We do not sell anything of that kind very much, and what little we do sell of that we buy in Louisiana.

Mr. POPE: Speaking of the difference in freights in the sum total of a year's business of a merchant where this item of rates to Nashville and Chattanooga was a factor in the expense of doing the business, would you or would you not count that sum as an expense of your business?

Mr. PEEPLES: It is undoubtedly an expense. It is that much extra expense heaped on us. Nashville has not that expense. We have a higher rate to pay, and we say that it is that much extra, because it is that much *of* out of our pockets.

Mr. POPE: If you were located at Nashville, how would your income be affected then?

Mr. PEEPLES: I do not know that I am discussing that. But I am talking about the difference between the two places in freights.

Mr. POPE: I want to see how you treat that item.

Mr. PEEPLES: Well, I mean taking the goods and shipping them from the same points in the East, coming over the same roads, and Nashville being one hundred and fifty miles further off than Chattanooga, that it would get much lower rates than Chattanooga.

Mr. POPE: We have heard also about the particular territory—Nashville territory and Chattanooga territory. Be good enough to explain the legitimate territory on the Nashville road where Chattanooga ought to do business.

Mr. PEEPLES: Half way between here and Nashville.

Mr. POPE: In the direction of Memphis, how far?

Mr. PEEPLES: Well, I consider we ought to go half way to Memphis. The freight being equal, there is nothing to keep us from it.

Mr. POPE: Well, do you sell up to a point nearly half way to Nashville?

Mr. PEEPLES: Some goods, but very seldom. I do not think that we have gone half way to Nashville, because we have not had the freight rates to do so.

Mr. POPE: If the railroads working through Chattanooga did not participate in any degree in the handling of Nashville freights—suppose we did not handle it all—and the Nashville rates remained *in* the same as they are now, you would have the same grievance as against the development of your trade, would you not?

349 Mr. PEEPLES: If there were no railroads between here and Nashville?

Mr. POPE: If we did not do any business into Nashville from the East, haul no goods there, assuming that the Nashville rates re-

mained the same as they are now, you would still want the rates reduced coming into Chattanooga?

Mr. PEEPLES: If the roads running through here did not discriminate against us——

Mr. POPE: You do not understand——

Com'r MORRISON: Let me answer, Mr. Pope.

Mr. PEEPLES: If the roads running through here did not discriminate against us I do — think we would have any charge against those railroads, but we might have complaints against railroads from the West if some towns were permitted to ship goods a greater distance for a less price than others.

Mr. POPE: I would like for you to answer my question just as I put it. Suppose these railroads did not name any rates from eastern cities to Nashville at all—did not do any Nashville business from eastern cities—and the Chattanooga rates remained just as they are now, would you not still feel, or would you still feel that you had a complaint against these rates and would insist that these roads should reduce their rates to Chattanooga?

Mr. PEEPLES: I do not think we would.

Mr. POPE: Your Nashville trade would still suffer?

Mr. PEEPLES: If Nashville got a lower rate of freight than we got here and then they made a rate of freight out of Nashville the same as they do here, the rate would be against us.

Mr. POPE: And you are suffering from an inability to do business?

Mr. PEEPLES: What we are complaining of is hauling freight a greater distance for a less price. I contracted the other day for the sale of some goods to go over the Cincinnati railroad, to be delivered to a point in Alabama.

Mr. POPE: Where did that come from?

Mr. PEEPLES: From the West.

Mr. POPE: What territory is your trade in?

Mr. PEEPLES: On the Western and Atlantic road, on the road to Dalton; on the Chattanooga, Rome and Columbus; on the Cincinnati Southern; on all the roads that run in here.

Mr. POPE: Can you, from general remembrance, state what proportion of the trade as a whole is done in other territory than in the direction of the Nashville territory or the Memphis territory?

350 Mr. PEEPLES: Well, the bulk of our trade is done in other directions; that is, two points out of eight or ten.

Mr. DANIELLS: Is not that due to this discrimination?

Mr. PEEPLES: You cannot expect one or two roads to do the same amount of business as eight or ten. Two roads do that business and eight or ten are running here. We do business by the river also.

Mr. LAWTON: How far down the Western and Atlantic do you sell?

Mr. PEEPLES: To Cartersville.

Mr. LAWTON: That is nearer to Atlanta than to Chattanooga?

Mr. PEEPLES: A little nearer to Atlanta.

Mr. LAWTON: Do you sell western products down that far?

Mr. PEEPLES: Yes, sir.

Mr. LAWTON: Are the rates from the West lower to Chattanooga than to Atlanta?

Mr. PEEPLES: I do not know whether they are or not. I am not posted on western rates.

Mr. LAWTON: You are unable to compete successfully?

Mr. PEEPLES: Sometimes when we come to sell goods we give prices and sell goods in Nashville territory, although at a loss to us.

Mr. LAWTON: Is it not probable that Nashville does the same?

Mr. PEEPLES: I do not think she has to.

Mr. LAWTON: She might do so if necessary?

Mr. PEEPLES: A little bit. That is the way we do in selling goods in Cartersville.

Mr. CONNOR: Please tell the commission if your traveling men do not meet the Nashville merchants competing on the Alabama Great Southern road with you.

Mr. PEEPLES: O, yes.

Mr. CONNOR: On the Western and Atlantic?

Mr. PEEPLES: The Nashville merchants? Well, I suppose they sell some goods there.

Mr. CONNOR: They compete with you on the Nashville and Chattanooga railroad, do they not?

Mr. PEEPLES: Yes, sir; they do, and on *the* all the Nashville branches.

Mr. CONNOR: You meet the competition of Nashville merchants?

Mr. PEEPLES: We meet a great deal of competition on the Alabama Great Southern, and flour can be shipped to Nashville at twenty-two cents a barrel cheaper than to Chattanooga.

351 Mr. LAWTON: Do not your traveling men meet New York merchants at a good many of these places?

Mr. PEEPLES: Sometimes on cigars, but not on such things as groceries.

Mr. LAWTON: But to a certain extent they do?

Mr. PEEPLES: To some extent. We use to have a great deal, but not much now. Competition is so close now that they cannot afford to take the risk on the margin we are taking it.

Mr. CIST: You say you meet competition of Nashville at western and Atlantic points. Can you give any instance of it—on the Western and Atlantic railroad?

Mr. PEEPLES: I am told by our men that they occasionally run up against a Nashville man on that road.

Mr. CIST: Did they examine him as to what he was doing there?

Mr. PEEPLES: No, but in a general way we know that when Nashville men are out there they are there to sell goods.

Mr. CIST: A Nashville man was found there and he told your traveling man something and your traveling man told you something?

Com'r MORRISON: Anything further, gentlemen?

Mr. SHEPPARD: You are not at all familiar with the conditions of traffic at Nashville as compared with those at Chattanooga? You know nothing about the different systems of railroads to Nashville?

Mr. PEEPLES: They have a number of railroads there, but they have not as many lines of railroad as we have.

Mr. SHEPPARD: It would be quite sufficient if the rate to Nashville was raised, would it not?

Mr. PEEPLES: I have never been an advocate of raising rates.

Mr. SHEPPARD: That would suit your purpose in this particular controversy just as well, would it not?

Mr. PEEPLES: *If* course if we were not discriminated against we would not fight, but as to raising Nashville rates we do not wish that.

Mr. CLARKE: Now, you speak of Nashville competing with you on the Alabama Great Southern road. Do you mean in eastern freights, in goods that have come over these eastern roads, that they compete with you on the Alabama Great Southern as to them?

Mr. PEEPLES: Yes, sir.

Mr. CLARKE: To do so those goods would take a through rate to Nashville and then would have to add two locals, would they not?

Mr. PEEPLES: Yes, sir.

352 Mr. CLARKE: And you add one local?

Mr. PEEPLES: Yes, sir.

Mr. CLARKE: As a matter of fact, leaving out what drummers say, when you add to the through rate from the East to Nashville two locals would not that make the entire rate higher than adding one local from here?

Mr. PEEPLES: They claim that they can lay the freight down cheaper than we can.

Mr. CLARKE: Do you know what the rate is?

Mr. PEEPLES: No, sir.

Mr. CLARKE: Do you know what the local is over the Louisville and Nashville to Birmingham and then over the Alabama Great Southern?

Mr. PEEPLES: I do not know.

Mr. CLARKE: So you do not know whether it would be greater or less?

Mr. PEEPLES: Well, the only thing about that is that they can ship goods in there and lay them down there cheaper than we can. We have got to cut our margin.

Mr. CLARKE: Well, do you not know whether the freight paid is greater or less when the two locals are added? Have you ever figured on it?

Mr. PEEPLES: I never have.

Mr. CLARKE: Well, now, about the through rate to Nashville. Suppose this honorable commission raises the Nashville rates the same as Chattanooga, and the Louisville and Nashville and Ohio River routes had the same rates as now and so take eastern traffic over that route, would that give you relief?

Mr. PEEPLES: I do not think it would.

Mr. CLARKE: Then it would afford no relief unless it made them all raise their rates—the Louisville and Nashville and the Ohio River routes?

Mr. PEEPLES: I suppose if they were to come down here—if this road was to come down and those others were to let it stay as it is it would not hurt us.

Mr. DANIELLS: That is all.

T. A. SNOW, a witness on behalf of the complainant, having been duly sworn, testified as follows:

Mr. DANIELLS: Your name is T. A. Snow.

Mr. SNOW: Yes, sir.

Mr. DANIELLS: You reside in Chattanooga?

Mr. SNOW: Yes, sir.

Mr. DANIELLS: What is your business?

Mr. SNOW: Stove and tin business.

353 Mr. DANIELLS: Both retail and wholesale?

Mr. SNOW: Yes, sir.

Mr. DANIELLS: State whether or not you sell goods and compete for business in the same territory as Nashville and Memphis?

Mr. SNOW: Yes, sir, we do.

Mr. DANIELLS: Now, you may tell the commission any facts in relation to discrimination against Chattanooga in favor of these other places.

Mr. SNOW: Well, I have not the figures to prove it, but I know that Nashville gets a better rate of freight from the East than we do. And the merchants down in Alabama can get a better through rate than we can ship to Chattanooga and then ship from here there. So that they can lay down their goods cheaper than we can sell to them.

Mr. DANIELLS: Have you ever had an actual case where you were charged more to Chattanooga by a considerable amount than the Nashville merchant for the same goods? Shipping from the East and what points from the East and over what roads?

Mr. SNOW: Over the East Tennessee from New York.

Mr. DANIELLS: Tell the commission what it was and all about it.

Mr. SNOW: We had a shipment a short while ago, in September I believe it was, where we were charged a $1.14 freight on coal-hods, and the merchant in Nashville got *h* the same goods delivered to him for thirty-six cents.

Mr. DANIELLS: Over the same line?

Mr. SNOW: He wrote me that he had it shipped over the same line. I have not his bill but I have his letter stating that.

Mr. DANIELLS: State whether or not this same party in Nashville bought the goods for you.

Mr. SNOW: They bought all the goods at the same time, bought in the same order with their own, and I suppose the same goods were shipped at the same time.

Mr. DANIELLS: What credit, if any, did they give you on the matter of freights?

Mr. SNOW: They put in my order with the others. They had a part of the goods delivered in Nashville at the thirty-six rate and they allowed me the thirty-six rate the same as they got theirs, and I paid the difference between thirty-six cents and a $1.14, and they refunded the difference.

Mr. DANIELLS: That is a transaction you had with them?

Mr. SNOW: Yes, sir.

354 Mr. DANIELLS: Do you know any other facts?

Mr. SNOW: Well, I have not been keeping track of them. I know we pay a higher rate of freight, but I have not the figures to show it.

Mr. DANIELLS: Have you any idea to what extent your business is affected yearly by reason of this discrimination in freight?

Mr. SNOW: I could not tell that now.

Mr. DANIELLS: Could you approximate it?

Mr. SNOW: No, we do a large business—ours is more manufacturing. We sell more goods that we manufacture than we buy.

Mr. DANIELLS: That is all.

Cross-examination:

Mr. BAXTER: From whom was those coal-hods purchased?

Mr. SNOW: They were purchased from a house in New York, called Ironside Manufacturing Company.

Mr. BAXTER: Where shipped from?

Mr. SNOW: From New York. I have got the expense bill showing exactly what we paid for them.

Com'r BRAGG: Were they carried to Nashville or put off here?

Mr. SNOW: They were put off here. This expense bill shows what we paid to the East Tennessee road. The expense bill from that road to us.

Com'r BRAGG: Put off here at Chattanooga and you paid thirty-six cents?

Mr. SNOW: We paid one dollar and fourteen; the Nashville merchant wrote me that he paid thirty-six cents.

Mr. DANIELLS: He bought goods for himself at the same? They paid thirty-six cents to Nashville and you paid $1.14 to Chattanooga?

Mr. SNOW: I will read a part of the letter (reading): "The rate from Nashville is thirty-six cents. We made you a credit of thirty-six cents and charged it to the Ironside Manufacturing Company on their account." I wrote him to send expense bills and bills of lading. He said he had sent them back to the manufacturers so that they could use them as vouchers to credit me.

Com'r MORRISON: Judge, do you care to follow this line of testimony any further?

Mr. MOON: No, sir; we do not desire to follow it any further. We have the charter of the board of trade here. The answers of the defendants denied the incorporation of the board of trade. I understand they are now willing to admit that and we only offer the charter.

(The charter referred to is marked Exhibit No. 6.)

355 Mr. CONNOR: We would like to submit a statement of facts as to the tariffs, of course with the distinct understanding that any clerical errors will be allowed for. We simply wish to direct the attention of the commission to the facts in the case which can be verified at their leisure. We can show by this the discrimination against us. By the table of distances which is shown here we want to show that we are nearer the eastern seaboard than the city of Nashville. I desire to submit this table to the honorable commission and will read the totals.

From the city of New York to Nashville, 1,012 miles by the Louisville and Nashville; from the city of New York to Chattanooga it is 900 miles.

If we come by way of the city of Cincinnati to the city of Nashville we find that it is from New York to Cincinnati by the Pennsylvania 717 miles; from there to the city of Nashville it is 295 miles, which makes a total of 1,012 miles. But if you come down there to Cincinnati it is 717 miles from New York, and 335 miles to the city of Chattanooga from Cincinnati, which makes it only 1,052 miles to Chattanooga by the longest route; only forty miles further than Nashville, and yet they get a rate of ninety-one cents and we pay $1.14.

(The statement referred to is marked Exhibit No. 1.)

The question has been asked by gentlemen here if the rate from New York to Nashville added to the rate from Nashville to a point on the A. G. S., would it not be greater than it would be by adding the New York rate to the local from Chattanooga. The impression made is wrong. The rate from Nashville is less and I will take the liberty of reading to the court from the statement.

If you add to the rate of $1.14 the rate to Chattanooga, the rate to Fort Payne you will have a higher rate than from Nashville to the same point. By adding to the ninety-one cent rate to the city of Nashville the rate of sixty-one to Fort Payne the freight can be laid down at $1.52 in Fort Payne or nine cents cheaper than we can do it. This prevails at all points.

Also from the city of Cincinnati to Chattanooga it is 335 miles. Now, sir, they can lay down first-class freight from New York, that is merchandise, bringing it from New York and reshipping at Cincinnati and lay it down from Cincinnati at Fort Payne at $1.44, while it costs Chattanooga $1.61.

The city of Cincinnati can ship freight from New York to Cincinnati and reship it from there, and they can lay down first freight at points on the Memphis and Charleston road for
356 less than Chattanooga merchants can do it; for instance, the rate to Decatur from Cincinnati, the through rate would be $1.40 while the merchants of Chattanooga pay $1.62. The same ratio prevails in all the other freights.

(The statement referred to is marked Exhibit No. 2.)

Com'r MORRISON: You claim, Mr. Connor, that the rate sheets which are on file with the commission will prove this?

Mr. CONNOR: We claim nothing unless the rate sheets prove them.

Com'r BRAGG: You mean that these are a condensed summary of what the tariffs show?

Mr. CONNOR: We have here now a comparison of freight rates to stations on the Nashville, Chattanooga and Saint Louis railway. The town of Bridgeport is one hundred and twenty-nine miles from the city of Nashville, and thirty-eight miles from Chattanooga. Yet, the city of Nashville lays it first-class freight down in Bridgeport at $1.41 while we pay $1.42. Let us go down to Dunlap. That is from Nashville 161 miles while it is only 66 miles from us. We have to pay for first-class freight to the city of Dunlap $1.45 while the city of Nashville though it hauls the freight nearly 100 miles further, lays it down for two cents less, that is at $1.43, and that prevails at all stations and on all the branches of that road.

(The statement referred to is marked Exhibit No. 3.)

I desire to read the answer of the Pennsylvania railroad.

(Mr. Connor reads the answer referred to and the same is marked Exhibit No. 4.) I wish now to show that the rates to Nashville are prorated over a long line from the city of New York and is about 1.8 cents per ton per mile to the city of Nashville, the Louisville and Nashville road taking the same rate per ton as the Pennsylvania road.

The Pennsylvania railroad states in its answer that it forms a route with the Shenandoah Valley railroad, the Norfolk and Western railroad and other railroads and that the rates are fixed by the Southern Railway and Steamship Association and that it accepts the rate fixed to Nashville.

The Cincinnati Southern railroad charges more per ton per mile into Chattanooga than the same line charges from the city of New York into the city of Nashville.

I submit these papers for the consideration of the commission.

(The papers referred are marked Exhibit No. 5.)

Com'r MORRISON: Have you anything further, gentlemen?

357 Mr. MOON: No, sir; we will close.

Mr. BAXTER: We call Mr. E. Fitzgerald.

E. FITZGERALD, a witness on behalf of the respondents, having been duly sworn, testified as follows:

Mr. BAXTER: Do you know the nature of the complaint that is made in this petition, that was read this morning in which the facts are admitted that the rates to Nashville and Memphis are less than they are to Chattanooga from the eastern points named. Please state to the commission in your own way the reasons that exist for those rates and why there is no relative injustice to Chattanooga.

Mr. FITZGERALD: The rates to Nashville are made by adding the rate to Louisville to a line of rates adopted by the Louisville

and Nashville railroad as ascertained and supposed to be the rates charged by the steamer lines on the Ohio river and the Cumberland river both from Louisville and Evansville into Nashville. That the adjustment of rates thus made has existed for a great many years. The rate at the present time is made by the trunk-line rate to Louisville plus these figures. As far as the division of the rate—but I do not suppose that that is of any importance in this case. But in reply to Maj. Connor, I will say that recently the Pennsylvania railroad and other lines have formed an all-rail line or a trunk-line route and that the division of those rates charged, the percentage, was not ascertained upon the basis of miles but they took the rates from New York to Louisville and then the rate from Louisville to Nashville in the manner I have stated by basing the percentage upon what is called a revenue basis and that is how those rates are now divided, but in the division of it you will find that the lines south of Louisville receives the proportion which I have given you as being the basis of those rates.

The Nashville question is one with which we have worked for a very long time not only in regard to the question of rates but in the question of classification, and it would be impossible for you to arrive at a fair reckoning on the rates until you have before you both the rates and the classification. The Southern Railway and Steamship Association has no control over the Nashville rates. It is not regarded as under their control in that association. It is not made by them or by the East Tennessee road. It is not made by any line that enters Nashville from the South nor have they
358 any voice in the construction of that rate. It varies according as the rates vary from the East to the Ohio River towns—to Cincinnati, to Louisville, and to Evansville.

Memphis doubtless you know—the rates from Memphis is made by competition by way of New Orleans. The rates are made by steamer to New Orleans and thence by rail to Memphis and likewise by water to Memphis. Those rates are very much lower than our rates now in effect.

Chattanooga is put in a group the same as Atlanta, Rome, Anniston, Attalla, and many other points that constitute that group. It is made by agreement among the members of the Southern Railway and Steamship Association.

In regard to the volume of business, the trunk lines carry, I would say, certainly half and possibly more of the business to to Nashville than is carried by these lines either by the southern routes or by the Tennessee line. It is a question of competition.

It has been suggested in one of the questions here, what the effect would be if these lines were to withdraw entirely from competition at Nashville. It would not have any effect with the Nashville rate, but it would affect us.

In that connection I want to state the fact that we receive a large amount of traffic for the South from the direction of Nashville—from the West through Nashville—it is immensely greater in volume that the traffic from the South, from the East, and from all directions in the direction of Nashville. Thus, it is, if we were for-

bidden to compete against a condition for which we are in no degree responsible, if we were forbidden to go into that territory because of an alleged difference that is here alleged it would place us at a disadvantage, it would place the southern territory at a disadvantage, it would place all the territory passing through Chattanooga at a disadvantage, because it would not be possible for us to carry traffic from the western territory to the southern territory at the same rate as we are now carrying. Already our tonnage south-bound from the West into our southern territory into Chattanooga territory is so much greater than our traffic north-bound through Nashville that it would become necessary for us to withdraw from certain lines of business or else send our empty cars in that direction.

I do not know that I can say any more than to submit that the rates from New York to Nashville are lower because of the different conditions, such as absolute water competition; lower be-
359 cause of rates made by influences over which we have no control; lower from the fact that it is possible to ship this property at the full trunk-line rate and then reach Nashville in the rear at rates we could not control or affect.

If we were to make a lower rate to Chattanooga let us see what would be the effect of that. We enter a large part of the southern territory through Chattanooga.

Take Atlanta. Is it possible to say that the lines working from New York, through Savannah shall not work to Chattanooga? Yet, if you reduce the Chattanooga rate you come directly in conflict with the fourth section. There is no water competition that would have that effect at that time. You cannot reduce the rate to Chattanooga without reducing it to Atlanta, Macon, Augusta, Knoxville and Bristol. It is the key to the whole situation in the southern territory, and you cannot make these reductions without bringing about radical reductions to other points that would force losses upon these roads that would mean bankruptcy. You cannot advance Nashville rates because of the causes I have pointed out. You cannot advance the rates to Memphis because of the water line to that point, the rate being 25 cents per hundred pounds less on first class than our- is.

Com'r BRAGG: What line is that?

Mr. FITZGERALD: I refer to the line by way of New Orleans. The Mississippi Valley line is 25 cents less; the river line is 45 cents less. These are the conditions.

There is another point, and it is not worth while to deal with tariffs because you have all the tariffs on file in your office.

When you look at Chattanooga's growth, all of her great interests built up here, and realize the fact that by the admission of these gentlemen, and I think they are in error even taking their own figure for it—that the amount of traffic involved in this complaint is less than one-third of the merchandise. Now, I want you in dealing with this proposition, I want you to go into the figures and go into the conditions that have made this city what it is. I want you to take the rates from Chattanooga and I want you to observe

the care with which the roads watch that interest. I want you to observe the rates on the manufactures, not the rates on epsom salts. And I then want you to make a comparison of those rates with the rates at competing markets. And I ask you to consider what these railroads must have done to build up these communities in its manufactures, enabling it to produce at home those articles. I
360 then want to call your attention to the rates from the territory south of here; the rates on sugar and molasses and coffee they bring in here from New Orleans. Take those into account if you please. Take the rates from any western city to Chattanooga and see what they are.

In dealing with this question you are dealing with questions of immense importance to this country. It involves the whole southern fabric of rates.

Mr. MOON: The gentleman has made a speech.

Com'r MORRISON: He is swearing to it though.

Mr. FITZGERALD: I do not desire to make a speech. I want to state the facts as they are. That this discrimination, as they allege, is upon an insignificant part of the business, but it is a matter of vital importance to us. I do not know that I need say anything more.

Com'r BRAGG: Do you understand that there is actual competition at Memphis between the New Orleans line and your line; actual competition?

Mr. FITZGERALD: I had occasion to look into that a little while ago. Almost the entire heavy business from the East is carried to Memphis by way of New Orleans. We have considered the matter very seriously as to what action we should take, whether to meet the rates or abandon the business, and we have actually agreed that these rates by the river lines and by the Mississippi Valley line shall continue in effect, and we do not pretend to meet the competition. We have not attempted to do the business. It is true as to cotton this season. Last year up to the 7th of September we carried twenty odd thousand, nearly thirty thousand bales; this year we have carried less than seven thousand bales. This is because of the rates that we would not meet from New Orleans to Memphis, the river and rail rates.

Com'r BRAGG: Well, now, the next point to which I want to call your attention is whether this traffic by the water line at Memphis involves the carriage of property that is large in amount from eastern points.

Mr. FITZGERALD: The volume of the traffic?

Com'r BRAGG: Yes.

Mr. FITZGERALD: It is considerable in volume.

Com'r BRAGG: About how does it compare with the whole amount from the east?

Mr. FITZGERALD: I assume that taking the whole traffic from eastern cities, from New York—now from Baltimore, of course the line by way of New Orleans would not attempt to do much because of the fact that it would be necessary to carry it to New York and

then to New Orleans, consequently out of Baltimore they do
361 not do much. From Boston, from Philadelphia, they do considerable as well as from New York. Now, I take it that at least one-third of the entire volume of business from eastern cities to Memphis is going into Memphis by way of New Orleans.

Com'r BRAGG: By water lines?

Mr. FITZGERALD: Either water or rail. Both of their rates are very much lower than ours.

Com'r BRAGG: You know the commission has ruled on that subject of water rates?

Mr. FITZGERALD: That effects the water rates.

Com'r BRAGG: What I was directing your attention to was the ocean and river rates.

Mr. FITZGERALD: It would be difficult for me to tell you that. It is a very large proportion of the business to Memphis which goes by steamer.

Com'r BRAGG: Well, could you prepare a statement of that kind?

Mr. FITZGERALD: I will endeavor to do that, though it is very difficult to get at that.

Com'r MORRISON: Do they not have some tonnage returns at Memphis in regard to that?

Mr. FITZGERALD: No, sir; but I can probably find out about the proportion from one of the largest concerns in Memphis. Several of the largest concerns in Memphis ship a very large proportion of their heavy traffic by river from New Orleans.

Com'r MORRISON: It comes to New Orleans by steamer?

Mr. FITZGERALD: Yes, sir; and thence by river. It is a very large proportion of the business, and the best evidence of that water competition is as I have just pointed out.

Com'r BRAGG: How about that water competition to Nashville, does it amount to anything much, or do you know anything about that?

Mr. FITZGERALD: In reply to an inquiry of the Nashville and Chattanooga road from me I have a letter on that subject, in which they assert most emphatically that it is of controlling force.

Com'r BRAGG: You do not know that yourself?

Mr. FITZGERALD: I have no knowledge of that myself. We only know this fact that in meeting the rates at Nashville we make them upon that basis. We do not make the rates at Nashville, have nothing at all to do with making them.

Mr. DANIELLS: I do not care to ask any questions.

Com'r MORRISON: Anything further, gentlemen?

362 Mr. LAWTON: As to the Georgia Central we have no testimony to offer. We simply rest upon the answer and offer no evidence.

Mr. BAXTER: We would like to introduce Mr. Pope.

Form 1416.

East Tennessee, Virginia & Georgia railway.
Memphis and Charleston railroad.
Mobile and Birmingham railway.
Knoxville & Ohio railroad.

Edwin Fitzgerald, traffic manager.

East Tenn., Va. & Ga. R'y. East Tenn. division & branches, 356.0. Georgia division and branches, 488.5. Alabama division and branches, 390.5. Knoxville & Ohio railroad, 66.0. Memphis & Charleston railroad, 330.0. Mobile & Birmingham railway, 149.3. Total mileage, 1,780.3.

KNOXVILLE, TENN., *Nov.* 23*rd*, 1890.

Edward A. Mos-ley, Esq., sec't'y Interstate Commerce Commission, Washington, D. C.

DEAR SIR: Reading over my testimony before the board as taken by my secretary, I desire to ask some slight changes and revisions, and beg to submit herewith what is intended to be an accurate statement of the case as presented in my testimony.

If not inconsistent to the rules of the commission, I would be glad to have this substituted, and on comparison with the notes of your stenographer, it will be found substantially in accordance with my statement of the case at the time of the hearing.

Yours truly,

(Signed) EDWIN FITZGERALD,
Traffic Manager.

Interstate Commerce Commission.

OFFICE OF THE SECRETARY,
WASHINGTON, *December* 1, 1890.

Major G. C. Connor, secretary board of trade, Chattanooga, Tennessee.

DEAR SIR: I herewith enclose a copy of the testimony taken in your cases at Chattanooga.

Traffic Manager Fitzgerald has sent to this office a revised
363 statement of his testimony, which he wishes to have filed.

This statement is forwarded for consideration. If you consent the statement of Mr. Fitzgerald will be placed at the end of his testimony and marked "Revised testimony of Edwin Fitzgerald." Please return the statement with your reply.

Very respectfully, —— ——, *Secretary.*

Revised testimony of Edwin Fitzgerald objected to by complainant. See last page of complainant's brief.

Testimony before the Interstate Commerce Commission.

EDWIN FITZGERALD, traffic manager, E. T., V. & G. R'y, sworn, testified as follows:

Mr. BAXTER: You have heard the complaint set forth in the petition, please state to the commission any facts you know that justify the present adjustment of rates from the East to Memphis and Nashville and Chattanooga.

Mr. FITZGERALD: We understand the issue to apply strictly as to the rates from eastern cities to Chattanooga, Memphis and Nashville.

The same total rates apply to Chattanooga as to Atlanta, Selma, Montgomery, Anniston, Rome, Attalla. The rates to Atlanta, Montgomery and Selma are made with reference to the controlling influence of water lines. In adjusting the rates from eastern cities to Chattanooga it has been deemed proper to apply the same totals as to Atlanta, although the distance for the purposes of rate-making is greater to Chattanooga than to Atlanta. In the matter of rates to Memphis and Nashville the conditions under which they are fixed are entirely dissimilar; they are in no degree influenced by competition of lines entering Nashville or Memphis through Chattanooga, nor have such lines any voice or influence in the making of such total rates. The element of controlling force, as will be shown, in fixing these total rates is the presence of the Ohio and Cumberland rivers at Nashville, and the Mississippi river at Memphis, affording river lines of communication from the Ohio River termini of the trunk-line system, by which low combination of rates can be made, but more forcible still as regards Memphis rates in the fact of communication by steamer lines from New York to New Orleans, and thence by the Mississippi River steamers.

364 That this competition is of controlling force is unfortunately for our interest made too apparent by the volume of the business they actually control, while our rate from New York on first class is $1.00 per hundred pounds (corresponding rates on other classes) the water lines make such figures as they see fit, regardless of the interest of the rail lines, and at the present time the published tariff- of such water lines show a difference in rates from New York to Memphis of 35c. per 100 lbs. on first class less that the rates of the rail line, and they make lower figures when the necessity requires. Memphis has the benefit of the steamers and barge lines plying the Ohio and Mississippi rivers between Pittsburg, Cincinnati, Cairo, St. Louis, &c., and New Orleans, all of which stop at Memphis and afford large facilities and frequent communication, and it is this competition that does, and has always, fixed the rates from eastern cities to Memphis, and the conditions cannot be changed.

As to Nashville rates, the same conditions of water competition prevail, stronger, however, in controlling force than exists at Memphis. As has been shown, steamer lines operate on the Ohio river from Pittsburg, Cincinnati, Louisville, &c. Nashville is located on the Cumberland river; it is a tributary of the Ohio; steamer lines operate on this river practically nine months in the year; their trips are frequent, and they extend large facilities for the control of traffic. The evidence as to the rates they actually charge from Cincinnati, Louisville, Evansville, &c. (these points being the Ohio River termini of the trunk-line system to Nashville) will hereafter be made to appear. The rates from eastern cities and Nashville are made by adding to the tariff rate from New York to Louisville the approximate rate charged by the river steamer lines from Lou-

isville, though as a fact the steamer lines do actually charge less than these figures, and considerably less when they so desire. In consequence of this combination, a higher rate cannot be charged by the trunk lines in connecting with the Louisville & Nashville railroad, than the present rate of 91c. per 100 lbs. first class; this is made by adding sixteen cents south of Louisville, to the New York-Louisville rate of seventy-five cents first class, with corresponding differences on other classes. I have endeavored thus to show that by the fact of this water competition, elements of controlling force, higher rates cannot be maintained to Nashville and Memphis, and the necessity for lower rates to Nashville is because of the fact that the steamers to Nashville enjoy shorter rail
365 connections from the East and accept rates which to some would be considered absurdly low; it is not a sentiment or a theory, as you will observe by further testimony, but it is a condition, and one over which southern lines have no control; they have no voice in the fixing of the rates nor an influence in causing them to be changed. No interest of southern lines is served by the lower rates to Nashville.

If it be unlawful for southern lines to compete for traffic to points to which the advantage of distance is with them; if it is unlawful for the commercial interest of Nashville to secure the advantages of quicker time and the better means of transportation that is extended by southern lines, and by reason of this violation of the law, as is alleged, southern lines should withdraw from competition for Nashville traffic, in what manner could Chattanooga be benefited? What other effect than ultimately to be hurtful to Chattanooga interest? It must be apparent to your honorable commission that if, as alleged, it is unlawful, discarding the actual conditions of water competition of controlling force, to charge a higher rate to Chattanooga than to Nashville, the Chattanooga rate cannot be reduced without effecting reductions to all points east of Chattanooga as far as Bristol. It would likewise necessitate reductions to Macon, Atlanta, Dalton, Rome, and thus will be destroyed the entire rate fabric of the South, from the Mississippi to the Potomac, from the Ohio to the Atlantic. If it is found a violation of the law to charge lesser rates to Nashville and Memphis from eastern cities, it would become indefinitely more unlawful to charge a lower rate to Chattanooga than to Atlanta, because all the business of Chattanooga entering through Charleston, Savannah and Brunswick and by the Piedmont air line, must necessarily pass through Atlanta, Dalton and Rome. It must be apparent, therefore, if it is found unlawful to engage in traffic between eastern cities and Nashville under the conditions as they are, and no existing law can change it; the necessity would be forced upon southern lines to withdraw from such traffic, for the little net revenue that results from it is insignificant by comparison with the destruction that a general reduction of rates would bring.

I have not particularly referred to the figures. The tariffs of our lines are on file in the office of the commission, but I do request to have made a part of this testimony the letter which I will hand to

the secretary, giving the rates charged by the steamers from Louisville to Nashville, and the figures used by the L. & N. Com-
366 pany south of Louisville, in making the total rates from eastern cities to Nashville.

The conditions of traffic and revenue enjoyed by southern lines is very similar to that of northern and western lines; the same conditions of rate construction that prevails for the immense volume of traffic passing over the lines of the North and West, if applied in the territory of the South would simply result in total bankruptcy of the railroads, and to make such rates upon merchandise traffic in our territory, would be to court destruction. It will occur to you that there must be some point at which the eastern lines with their low-rate basis will meet the southern lines, and Nashville and Memphis located well into southern territory, are made the points at which this competition meets, largely because of the water facilities that make possible low rates from the Ohio River points, therefore the break in the rates as between the eastern and trunk-line system and the southern system, meet- at these points.

In fixing the rates from western points to southern territory practicably the rates are fixed to the Ohio river, and another tariff is established from the Ohio and Mississippi River points to the territory of the South; it is possible therefore to adjust the rates so that Chattanooga and other points are so arranged as to give to them the benefit of their geographical position. Consequently from western territory, Chattanooga has an advantage in rates that Atlanta, Macon and other points further distant from the markets, does not enjoy.

That the business done by the southern lines to Memphis and Nashville is in a measure profitable, is admitted, but to reduce all of our rates to the same basis would result in destruction and practical confiscation of the property.

The traffic from eastern points to Chattanooga, constitutes but a small part of that which goes to make Chattanooga important as a commercial center; of the staple products, many of the most important are bought from other sections; molasses, sugar and considerable coffee from New Orleans, and in all instances Chattanooga enjoys the benefit of favorable rates; so likewise from the West. That it would be hurtful to Chattanooga's interest alike with other southern communities to compel southern lines to withdraw from Nashville and Memphis traffic can I believe be demonstrated. A large element of the business of Chattanooga is in the sale and distribution of food products brought from the West, and in the nature of things, the tariff must be as low as consistently can be
367 made. The traffic from the West to the South is very much greater in volume than is the tonnage from the South to the West, consequently an important consideration in the matter of traffic from the East to Memphis, Nashville and other points similarly situated in the matter of competition, is found in the fact that this business, even at low rates, makes it possible to furnish loading for cars which otherwise would return empty. It must be apparent therefore if for the purpose of handling the large traffic in food pro-

ducts from the West to Chattanooga and other southern points, much the largest proportion of the cars containing such traffic were returned empty, no other result could follow except that which would look to the advance in the rates upon this immense and important traffic. It can be demonstrated that the importance and magnificent growth of Chattanooga as an industrial and commercial center, could not have resulted if the influence of rates *are* as hurtful as has been stated, as a fact it is the result of the most liberal policy on the part of the managements of the railways identified with its interest.

The traffic from the eastern cities is an insignificant part of the total that goes to make up its importance as a manufacturing and commercial distributing point.

In the adjustment of rates from the West as I have said to Chattanooga, it possesses advantages, and in the adjustment of rates upon the traffic distributed by the merchants of Chattanooga, the railway managements have been foremost in their efforts to promote its interest; look at its growth; at the great industries built up and made possible by the liberal policy in the adjustment of rates.

In dealing with the Chattanooga rates from the East, you have before you the interest as I have shown that controls the entire southern fabric of rate construction.

Mr. MOON (interrupting): I hardly think it proper for the gentlemen to make a speech.

Commissioner MORRISON: Let him go on, he is under oath.

Mr. FITZGERALD: I am simply stating facts. In dealing with this Chattanooga question, you are handling a matter of vital importance to the whole South. I do not know that I need say anything more.

Commissioner BRAGG: Mr. Fitzgerald, I understood you to say there was a good deal of competition between your line and the water lines via New Orleans to Memphis.

Mr. FITZGERALD: Yes, sir; a very large proportion of the heavy classes of goods, including canned goods are carried by the
368 water lines, and only very recently we had under consideration the question of endeavoring to meet some of the rates or entirely abandoning competition for such traffic. The force of the competition is illustrated by the movement of cotton via New Orleans; from Sept. 1st to Nov. 7th of last year, the lines from Memphis, via New Orleans, carried about 43,000 bales; the corresponding period of this year, they have carried upwards of 61,000 bales, while our company's loss has been about in proportion to their gain.

Commissioner BRAGG: The next point worthy of attention is whether this traffic by water to New Orleans is considerable in volume.

Mr. FITZGERALD: The volume is considerable, but about how much, it is impossible for me to say. The volume from Baltimore, of course, would not amount to much; from Philadelphia, they do considerable, and from New York and New England, they move I believe at least one-third of the volume of business.

Commissioner BRAGG: What proportion would go from New Orleans by rail?

Mr. FITZGERALD: It would be difficut for me to tell, though a large portion goes by steamer from New Orleans. I understand the largest concerns in Memphis, Lowenstein Bros., Menken Bros., and others, ship a large proportion of their heavy traffic by river from New Orleans.

Commisssioner BRAGG: What about the water competition at Nashville?

Mr. FITZGERALD: The Nashville & Chattanooga road will answer that question fully. I have a letter from Mr. Knox, general freight agent of that road, bearing upon the subject, which I will ask to make a part of the testimony. I know that water competition exists at Nashville, and the rates from the East are made upon that basis.

No cross-examination.

A. POPE, a witness on behalf of the respondents, having been duly sworn, testified as follows:

Mr. BAXTER: Will you please state what the facts are in your knowledge that you think justify the difference in rates at Chattanooga, Nashville and Memphis.

Mr. POPE: I have naturally a certain amount of familiarity with the construction of Nashville rates and participation therein. Any statement that I make is necessarily an indorsement of what
369 has been said by Mr. Fitzgerald, of the non-participation of the lines through Chattanooga in making rates to Nashville. We are entirely clear and well grounded in the belief that the competition in handling traffic at Nashville at the rates at which it is done entirely is legitimate and in no respect violative of law.

The conditions, as I have endeavored to set out in the answer of the Norfolk and Western railroad, we believe are commercial conditions that pertain only to Nashville and that they are distinctive in all respects from the conditions surrounding the trade at Nashville.

The Southern Railway and Steamship Association has been referred to as being a party interested in controlling rates from eastern cities to Chattanooga. It may not be amiss for me to state that this is simply a voluntary arrangement, as explained to your honorable body at different times; it is simply a clerical organization for the purpose of harmonizing these rates at various competing points. In doing that it has put Chattanooga in a certain group of rates with other points which experience has justified the parties interested in considering that Chattanooga should be so grouped; that the best interests of fairness, and equity to the different markets in the South and Southwest justified that arrangement, and I assert that it would be absolutely necessary if a change were made in Chattanooga rates to make like changes in rates at other points embraced in that group, and I cannot understand, when looking at it from the point of view entertained by the merchants, what they desire except

something special with which to enable them to compete against other points, such as Nashville and Memphis.

I cannot understand how they are going to be benefited by having rates reduced here which will compel rates to be reduced at from twelve to twenty other towns south and southwest of them that will simply destroy their ability to do business in any preferential way against those towns. What they might make in having a lower line of rates to compete with *the* Nashville and Memphis will be lost to them in the reductions that would certainly follow in other directions where it is positive in my mind that their trade is most valuable. I think evidence has been submitted as to the direction of the trade of Chattanooga, to show the direction of the volume of trade. As to what extent trade is done in the direction of Nashville and Memphis there has been contrariety of testimony, and it is very indefinite.

I know of no other facts that I could state in this matter that has not been fully set forth.

370 Com'r MORRISON: You have stated the reasoning by which you state the conclusion that these rates are made? We have got to reason some too and we want the facts.

Now you say on behalf of your road that we charge less to Nashville even when we go through Chattanooga than we do to Chattanooga; but you say in your answer that we charge no more than a reasonable rate to Chattanooga, and we charge less to Nashville because we get some profit out of it but we charge to Nashville not all we ought to have but all we can get. Because if you did not carry at that rate some other carrier would carry it by us to Nashville at that rate. Then we would get nothing out of it.

Mr. BAXTER: It is on you to prove, having admitted that the rate is less to Nashville than to Chattanooga, it is on you to show that freight is carried by water some way, either by rail to Cincinnati and then down the river to Nashville at a lower rate than this rate to Chattanooga, or by some other water route that forces you to give them a lower rate.

Now, to what extent, if at all, is this same freight that goes through here cheaper to Nashville, carried to Cincinnati and then by river to Nashville or carried to New Orleans and then by river to Nashville, either part water and part rail or all water.

Com'r BRAGG: In other words, just in a few words, Mr. Baxter, state whether this competition at Nashville between the water lines and rail lines that bring down those lower rates is actual, as the commissioner has frequently decided it must be in order to justify lower rates, and whether it involves traffic important in amount.

Now, Com'r Morrison has just said that under the construction the commission has given the fourth section of the act to regulate commerce, whenever a carrier admits or the evidence shows that a carrier carries freight from the eastern seaboard to a place like Chattanooga at a higher rate than to a place like Nashville, which is a longer haul, then the burden of proof is on the carrier to show that there is water competition at Nashville which is important in amount;

either all water competition or part water and part rail. Now, what are the facts?

Mr. POPE: We understand the matter to be just this way. The rate from New York to Louisville is on the basis of seventy-five cents and that the average rate charged on the Ohio from Louisville to Nashville is sixteen cents. I may be wrong a cent or two in some of the figures. But a series of figures have been adopted by the Louisville and Nashville railroad based upon the actual
371 river figures at which freight is brought from Louisville to Nashville by the river, this makes the rate to Nashville seventy-five plus sixteen, or ninety-one cents.

It is also true that freights come to Pittsburg and then can be carried from Pittsburg via the Ohio and Cumberland rivers at very low figures.

Com'r BRAGG: Is the freight actually carried?

Mr. POPE: It is actually carried in considerable amounts. The Nashville and Chattanooga people are in a better position to testify as to that than we southern lines. The rate has been named to us and we have been acceptors from time to time of the series as being made and applied by the lines from the Ohio gateways. The lines through Nashville have been the acceptors of the rates as made under the conditions I have stated.

As to the actual tonnage carried I am not able to testify. In so far as Memphis is concerned I can state knowingly that the volume of traffic that goes by the Morgan line from New York to New Orleans and then up the river by steamer or carried by the Mississippi Valley railroad at river rates, as being very large. I know that the traffic of the Cromwell and Morgan lines is constantly increasing.

Com'r BRAGG: It might be well enough, Mr. Pope, to get up some tables on that subject.

Mr. POPE: I think we can show approximately the amount of tonnage. In so far as Baltimore is concerned it would be incidental. At Philadelphia that traffic is very large. You will find that the steamship companies' agents at Philadelphia and New York *and* receive property for the steamship lines. Traffic is carried from Boston by various lines to New York and is there given to the southern steamship lines. There is nothing hypothetical in that, they are matters of actual fact. The rates to Nashville are made in the way I have stated and have always been represented to us as being due to water competition.

Cross-examination:

Mr. CONNOR: You have been general freight agent for your road for a number of years. Do you say that the rate was made by the Louisville and Nashville railroad from Cincinnati to Nashville upon the figures that the river transportation made?

Mr. POPE: They were made upon a series of figures, as we understand it, averaged upon the river rates. I know that the lines composing the Virginia-Tennessee air line has never of its own motion made the Nashville rate.

372 Mr. CONNOR: I asked you if the Louisville and Nashville railroad made their rate from the city of Cincinnati to Nashville basing them on the river rates?

Mr. POPE: Yes, sir.

Mr. CONNOR: As one connected with the Southern Railway and Steamship Association, do you know that efforts have been made several times to compel the Louisville and Nashville to raise those rates?

Mr. POPE: Frequently efforts have been made to do so.

Mr. CONNOR: Have not efforts been made to raise rates from Cincinnati to Nashville by the Southern Railway and Steamship Association?

Mr. POPE: Yes, sir.

Mr. CONNOR: On more than one occasion?

Mr. POPE: Yes, sir; but the Louisville and Nashville said it could not raise those rates.

Mr. CONNOR: If the Southern Railway and Steamship Association thought that the rates ought to be raised for their interests why did not the Louisville and Nashville raise them?

Mr. POPE: I do not know why.

Mr. CONNOR: They gave you some reason for it, did they not?

Mr. POPE: I do not know what particular reasons were given. They made a demand upon the Louisville and Nashville to raise those rates, that is all I know.

Mr. CONNOR: I want you to answer my question.

Mr. POPE: I do not remember the particular reasons or the particular efforts to which you refer. I know that efforts were being constantly made to raise them.

Mr. CONNOR: Why did they refuse?

Mr. POPE: I do not remember Mr. Smith's reasons.

Mr. CONNOR; Now, you do not know why they refused to raise them?

Mr. POPE: I do not know, but I am positive they were averaged on the river rates.

Mr. CONNOR: Do you know what the first-class rate from Cincinnati to Nashville is?

Mr. POPE: I do not remember.

Mr. FITZGERALD: An effort has been made by the Louisville and Nashville railroad to advance the rates to Nashville not only once but many times, and they have persistently refused to advance the rates to Nashville because of the proportions charged by them from Louisville to Nashville were as high as could be charged because of
373 the rates being the same by the river, and that it was caused by water competition. In every effort to get the Nashville rates higher the Louisville and Nashville has persistently declined to advance those rates because of actual water competition. Not only has this been true since the existence of the commission, but years prior to that.

Mr. CONNOR: Now, Mr. Pope, the rate is twenty-six cents. Is not that the regular *pro rata* of the entire sum, per ton per mile, to the city of Nashville?

Mr. POPE: I am not familiar with that.

Mr. CONNOR: We make that assertion, may it please the court. We claim that the rate to the city of Nashville is a *pro rata* based upon the Pennsylvania standard rate from the city of New York to the city of Nashville and that the rate to Nashville is averaged that way.

How much actual freight of the classes we are talking about between Cincinnati and Nashville that comes from New York—how much of the entire tonnage that comes from New York to Nashville, comes by water?

Mr. POPE: I cannot express any opinion about that; I did not make any statement on that subject.

Mr. CONNOR: Well, if you say that you do not know, I suppose that ends that controversy.

Mr. BAXTER: By reason of the misdirection of the notices we did not receive them for two weeks.

Mr. CIST: There is water competition from Cincinnati also.

Mr. BAXTER: We think it has been sufficiently proved, certainly as to Memphis.

Com'r MORRISON: It is indefinite as to Memphis. You do not tell us how much there is.

Com'r BRAGG: The witness Fitzgerald is to furnish us some tables, but I do not know what they will show on that subject.

Mr. CONNOR: Do you know how many months of the year steamboats can transport freight from Cincinnati to Nashville?

Mr. POPE: I cannot tell positively.

Mr. CONNOR: Do you suppose they can do so for six months?

Mr. POPE: Yes, sir.

Mr. CONNOR: Do you think they can transport it for nine months?

Mr. POPE: I cannot say as to that. There are others here more competent to testify as to that.

Mr. CONNOR: Now, then, you feel positive as to six months, but not positive as to any time beyond that, and in your mind there is a possibility that for three or four months it cannot be transported?

374 Mr. CIST: I want to ask you one question as an expert in such matters as I think you are qualified as such, and that is with reference to the volume of business actually taken by the water lines from New York and eastern points via ocean to New Orleans and thence up the river and what effect upon that volume would it have, if you were to materially raise your rate to Memphis?

Mr. POPE: Excepting, perhaps, first and second and third class freight it would be wholly absorbed by the water lines. In advance I feel sure that fourth, fifth, and sixth class business would go entirely by the water lines.

Mr. CIST: Then there is actual water competition to that point?

Mr. POPE: Yes, sir; there are two steamers per week of very large capacity from New York.

Mr. CIST: Now, does the same remark apply to what is known as the Valley road from New Orleans to Memphis? Is it not true

that but for the fact that the Valley road meets the water-route rate, that the water route would take all the business.

Mr. POPE: Yes, sir; it is compelled to meet that water rate to get any business.

Com'r MORRISON: Does this close the testimony, gentlemen?

Mr. BAXTER: We would like to have it understood whether or not, from the nature of the circumstances and from that fact that it was impossible for Mr. Knox to be here today, we can file interrogatories or take the deposition of Mr. Knox, who lives right at Nashville, and knowing of his personal knowledge of the river trade there; and we would like also to take testimony at Memphis on the same point.

Mr. MOON: If your honors please, we certainly object to anything of that sort. We understand that this commission, as a matter of course, are very liberal in allowing testimony to be taken. Still, I understand that this is a court, and not three gentlemen traveling about the country and inquiring about the will of the railroads or boards of trade. You sit in court and hold court according to rules of law and evidence, and I take it that this court, after the parties have been notified for a year, after all the answers have been filed and all the issues made, that with all the means in their power to bring their witnesses here, and with the power that this court has to bring them, will not now, after the case has been closed and the gentlemen see the probable effect of this testimony, permit
375 them to go out and search for further proof on this issue. I take it, your honors will proceed to the determination of this case as any other court would, and I have never heard of a case where depositions could be taken when the case had reached this stage.

Com'r MORRISON: Mr. Baxter, where is your witness? Could he not come over here in the morning?

Mr. CLARKE: I have a letter from him this morning saying that it is impossible to leave at this time, but he does not say when he could leave. The assistant general freight agent, who knows some of the facts, is here, and I propose to examine him. If the commission thinks it necessary to have Mr. Knox here, I will wire him. There is a train on which he can come.

Com'r BRAGG: That is a matter for you to determine. You know the decisions of the commission on the subject. The commission suggested these features in order that there may be no excuse about evidence not being introduced that the parties have.

Mr. CLARKE: Then I will wire him to come here.

JOHN A. CONNOR, a witness on behalf of the respondents, having been duly sworn, testified as follows:

Direct examination:

Mr. CLARKE: I will ask you to state to the court what office you hold in the Nashville, Chattanooga and St. Louis railway?

Mr. CONNOR: Assistant general freight agent.

Mr. CLARKE: What is the eastern terminus of that road's line? Does it go beyond Chattanooga or stop at Chattanooga?

Mr. CONNOR: It stops at Chattanooga.

Mr. CLARKE: I will ask you to state whether or not this road carries freight from eastern points to Chattanooga or carries it any part of the way.

Mr. CONNOR: No, sir.

Mr. CLARKE: You do not participate at all in carrying any freight from eastern points to Chattanooga?

Mr. CONNOR: No, sir.

Mr. CLARKE: You participate in it only when it is destined to Nashville?

Mr. CONNOR: That is all.

Mr. CLARKE: State, if you know, if your company has anything to do in fixing the rate under which it hauls to Nashville.

376 Mr. CONNOR: No, sir; it does not. We take the trunk-line rates to Louisville and add certain arbitraries from Louisville to Nashville.

Mr. CLARKE: You take the trunk-line rates to Louisville and certain arbitraries fixed by the Louisville & Nashville road to Nashville?

Mr. CONNOR: Yes, sir.

Mr. CLARKE: The rates fixed through here are the same as those via Louisville?

Mr. CONNOR: Yes, sir.

Mr. CLARKE: That governs the rates this line has to fix?

Mr. CONNOR: The same total of rates through Chattanooga as via Louisville.

Mr. CLARKE: State, if you know, on what basis the Louisville rates are fixed from Louisville to Nashville, or from the termini of the trunk line as you call them?

Mr. CONNOR: They are fixed as high as they think they can hold them and get the business as against the river.

Mr. CLARKE: I will ask you to state how long boats work on the river, what part of the year.

Mr. CONNOR: Boats work from Paducah, Kentucky, to Nashville—three boats a week for nine months in the year.

Mr. CLARKE: Do they carry freight to Nashville?

Mr. CONNOR: Yes, sir.

Mr. CLARKE: In considerable amount?

Mr. CONNOR: A very considerable amount; yes, sir.

Mr. CLARKE: And the rate is what the trunk-line rate is to Louisville plus the rate fixed for competition with river?

Mr. CONNOR: Yes, sir.

Mr. CLARKE: Do you know the facts to be that way?

Mr. CONNOR: Yes, sir.

Mr. CLARKE: I will ask you to state, whether or not, if the Louisville people should raise the rates from Louisville to Nashville, the traffic it now has would go by the river?

Mr. CONNOR: I think a considerable quantity would.

Mr. CLARKE: Has that been the case in the past?

Mr. CONNOR: Yes, sir.

Mr. CLARKE: And when they lowered it, it brought the freight over the railroad?

Mr. CONNOR: Yes, sir.

Mr. CLARKE: And that is the reason the railroad is carrying the amount it does now?

Mr. CONNOR: Yes, sir.

377 Mr. CLARKE: I will ask you to state if it is a fact that when the railroad carries it at the same price from Louisville and other terminal points to Nashville, at the same rate as the river, whether it gets the freight because it delivers it quicker.

Mr. CONNOR: Yes, sir; the railroad gets the business because it delivers it more promptly.

Mr. CLARKE: So that it is preferred to ship over the railroad, the rates being equal, on account of the shortness of the time?

Mr. CONNOR: Yes, sir.

Mr. CLARKE: That is all.

Mr. BAXTER: The boats which run from Paducah to Nashville make connection with other boats from Louisville and Cincinnati?

Mr. CONNOR: Yes, sir.

Mr. BAXTER: It makes connection with a line of boats on the Ohio?

Mr. CONNOR: Yes, sir.

Mr. CIST: The Ohio river is open almost constantly, is it not?

Mr. CONNOR: Yes, sir.

Cross-examination:

Mr. CONNOR: You say that you know that the Louisville & Nashville railroad make their rate from Cincinnati and not from Louisville—up from Cincinnati to Nashville and base it upon the river rates?

Mr. CONNOR: (Witness:) No, sir; I said from Louisville to Nashville.

Mr. CONNOR: Who makes the rate from Cincinnati?

Mr. CONNOR: (Witness:) The L. & N.

Mr. CONNOR: The same that makes it from Louisville to Nashville?

Mr. CONNOR: (Witness:) But the rates from eastern cities to Nashville are made by taking trunk-line rates to Louisville and adding the arbitraries fixed by the L. & N. road.

Mr. CONNOR: Are you consulted in making rates as to the Nashville and Chattanooga road?

Mr. CONNOR: (Witness:) No, sir.

Mr. CONNOR: Is there anything improper for you to tell me how you know that Louisville & Nashville road base their rates upon the river rates?

Mr. CONNOR: (Witness:) We know the rates from New York to Louisville and Cincinnati, and then we are furnished with figures from Louisville to Nashville and from Cincinnati to Nashville by the general freight agent.

378 Mr. CONNOR: But you swore just now that you knew that they based them upon these river rates; that they would make the arbitraries. You swore you knew that.

Mr. CONNOR: (Witness:) I have information here from the captain of the line of boats running from Paducah to Nashville stating what his rate is from Louisville and Cincinnati.

Mr. CONNOR: But you do not know that that is what influences the Louisville & Nashville road in fixing those rates? You have no personal knowledge on that subject, only information and letters?

Mr. CONNOR: (Witness:) I do not know that, except I know it like anything else. That is the way they fix the rates. They tell us so.

Mr. CONNOR: That is your information?

Mr. CONNOR: (Witness:) Yes, sir.

Mr. CONNOR: Do you know what the first-class rate is from New York to Nashville?

Mr. CONNOR: (Witness:) It is 91 cents.

Mr. CONNOR: From New York to Cincinnati?

Mr. CONNOR: (Witness:) 65 cents.

Mr. CONNOR: And that would leave how many cents from Cincinnati to Nashville?

Mr. CONNOR: (Witness:) 26 cents.

Mr. CONNOR: Is not that 26 cents the same rate per ton per mile as the rate from the city of New York to the city of Nashville, and therefore not an arbitrary but a *pro rata?*

Mr. CONNOR: (Witness:) It is an arbitrary, as I understand it. It may figure out the same rate per ton per mile.

Mr. CONNOR: But the rate of 1.8 cents per ton per mile will give a rate of 91 cents. You are not positive it is an arbitrary, are you?

Mr. CONNOR: (Witness:) It can be classed either one. It can be classed as an arbitrary or a *pro rata.*

Mr. CONNOR: It would not be legitimately an arbitrary if it were a *pro rata?*

Mr. CONNOR: (Witness:) If it were prorated it would have to figure out exactly 26 cents, which is not likely. My understanding is that it is a regular fixed arbitrary.

Mr. CONNOR: You tell the court, then, that you thought it was an arbitrary, but that you are not certain.

Mr. CONNOR: (Witness:) They were furnished to me by the officials of the Louisville & Nashville road as an arbitrary.

Com'r MORRISON: You said there was one line of boats which carried to Paducah and then another line up the Cumberland river?

379 Mr. CONNOR: (Witness:) There is a regular line of three boats per week from Paducah to Nashville up the Cumberland and then there are boats coming down the Ohio from Cincinnati and transfer at Paducah.

Mr. CONNOR: There are three months of the year when they cannot run?

Mr. CONNOR: (Witness:) Yes, sir.

Mr. CONNOR: And three months of the year they cannot ship by river to Nashville?

Mr. CONNOR: (Witness:) Yes, sir.

Mr. CONNOR: So they can run only 9 months?

Mr. CONNOR: (Witness:) Yes, sir.

Mr. CONNOR: Do you know of your own personal knowledge that there is much New York, Boston and Philadelphia freight that comes to Nashville via Cincinnati, the Ohio river to Paducah and then up the Cumberland river?

Mr. CONNOR: (Witness:) I do not think there is any right now because the proportions charged by the L. & N. road will not permit business to come that way. But I think it would come that way if the rate were advanced.

Mr. CONNOR: To the best of your information there is no freight coming from eastern points to Nashville?

Mr. CONNOR: (Witness:) Not right now by reason of the fact that the proportions charged by the Louisville & Nashville road shut the boats out.

Mr. CONNOR: And so far as you know that rate is the *pro rata* of the entire rate?

Mr. CONNOR: (Witness:) Of course, that I cannot say.

Com'r BRAGG: What three months of the year is it the boats do not come?

Mr. CONNOR: (Witness:) June, July and August.

Com'r BRAGG: You said awhile ago that the freight was considerable?

Mr. CONNOR: (Witness:) Yes, sir; they do a large business in general merchandise from Cincinnati, Louisville and St. Louis proper to Nashville. They are not doing any eastern business now on account of the rates fixed by the Louisville & Nashville railroad.

Com'r BRAGG: How long is it since they were doing eastern business?

Mr. CONNOR: Ever since the rates from the East to Nashville have been constructed as they are now.

Com'r BRAGG: How long ago is that?

Mr. CONNOR: (Witness:) Several years ago.

Com'r BRAGG: About how many years?

Mr. CONNOR: (Witness:) From the East to Nashville they have not done any business for eight or ten years; I think those
380 proportion- have been in effect probably that long.

Mr. CONNOR: You said there was about three boats a week. How many car-loads of freight will one of those boats carry, to the best of your information?

Mr. CONNOR: (Witness:) That would depend upon the class of freight.

Mr. CONNOR: What would be the tonnage? How many car-loads of 40,000 pounds to the car?

Mr. CONNOR: (Witness:) I do not know how much exactly.

Mr. CONNOR: Would it bring five car-loads?

Mr. CONNOR: (Witness:) More than that, I think.

Mr. CONNOR: Probably six or eight?

Mr. CONNOR: (Witness:) Six or eight, I would think.

Mr. CONNOR: That is eighteen car-loads a week. How many car-loads of freight do you think would come into Nashville from Cincinati and Louisville by rail in the same time?

Mr. CONNOR: (Witness:) Probably the business into Nashville by rail——

Mr. CONNOR: Answer my question. How many car-loads of freight would come by rail during the same time—one week—from the cities of Cincinnati and Louisville into the city of Nashville?

Mr. CONNOR: (Witness:) I do not know that I can answer that question. You want to know how many car-loads of freight would come into Nashville all-rail from Cincinnati and Louisville during that week?

Mr. CONNOR: Yes, sir.

Mr. CONNOR: (Witness:) Well, I suppose the ratio would be about 10 to 90.

Com'r MORRISON: That is a matter of calculation, then?

Mr. CONNOR: (Witness:) Yes, sir.

Mr. CONNOR: Does not one hundred car-loads come by rail?

Mr. CONNOR: (Witness:) More than that.

Mr. CONNOR: 200?

Mr. CONNOR: (Witness:) No, sir.

Mr. CONNOR: Not 200 car-loads a day?

Mr. CONNOR: (Witness:) Are you taking the entire business?

Mr. CONNOR: The same class of business as would come by river as would come by rail. What I wish to show is that the competition of the river is not of any consequence when compared with the vast volume of business done to that city.

What proportion of the business of Nashville comes by river now, of eastern freight?

381 Mr. CONNOR: (Witness:) None.

Mr. CLARKE: You state that the rates from Louisville and Cincinnati were called arbitraries because they were fixed on the river basis instead of the prorate basis, and that prior to the reduction of the rate on the Louisville system by which it made these arbitraries, that a considerable portion of that trade went by river?

Mr. CONNOR: (Witness:) Yes, sir.

Mr. CLARKE: Well, I will ask you to state to the court if the number of boats that are on the river is not in proportion to the amount of business they can get and that if the Louisville's arbi trary were raised and more business thrown to the river if more boats would not come on the river?

Mr. CONNOR: (Witness:) Yes, sir; if the amount of business on the river was increased more boats would come to the river.

Mr. CONNOR: Do you not know whether these are arbitraries *are* prorates?

Mr. CONNOR: (Witness:) I tried to explain that a while ago that they told us they were arbitraries and they were called arbitraries.

Mr. LAWTON: Do you know what proportion of the business from eastern seaboard points to Nashville comes through Chattanooga?

Mr. CONNOR: (Witness:) Taking all the routes via Cincinnati to Nashville, I suppose over 60 per cent. comes through Chattanooga.

Mr. LAWTON: Then 40 per cent. comes by the trunk lines?

Mr. CONNOR: (Witness:) That would be my idea about it.

Mr. LAWTON: Do you know whether or not in making rates by the trunk lines to such a point as Louisville, from which point an arbitrary or proportion to Nashville is added—do you know whether water competition enters into that rate—the competition by canal and lake lines—in fixing the trunk-line rates to Louisville. That is, what are the trunk-line rates based upon?

Mr. CONNOR: (Witness:) As I understand the construction of eastern rates they take New York and Chicago as a basis.

Mr. LAWTON: All rates are made upon a percentage of the Chicago rates?

Mr. CONNOR: (Witness:) Yes, sir.

Mr. LAWTON: What are Chicago rates controlled by?

Mr. CONNOR: (Witness:) Water competition.

Mr. LAWTON: They have an all-water route to Chicago from New York the whole way?

382 Mr. CONNOR: (Witness:) Yes, sir.

Mr. LAWTON: Does the New York Central & Hudson River handle business between New York and Chicago.

Mr. CONNOR: (Witness:) I am not so well posted as to rates leading out of New York.

Mr. LAWTON: They are all based upon a percentage of the Chicago rates?

Mr. CONNOR: (Witness:) Yes, sir.

Mr. CLARKE: I believe you said that of all the freight going down from Louisville to Nashville that the boats carried about ten per cent.?

Mr. CONNOR: (Witness:) From Louisville and Cincinnati they handle quite a large volume of business.

Mr. CONNOR: But you do not mean that they carry any freight from the East?

Mr. CONNOR: (Witness:) No, sir.

Com'r MORRISON: Is that all, gentlemen?

Mr. CLARKE: Have you read the letter of Mr. Knox referred to by Mr. Fitzgerald explaining this matter?

Mr. CONNOR: (Witness:) Yes, sir.

Mr. CLARKE: I ask to have this put in the record as it is explanatory and may be of use to the commission.

(The letter referred to is marked Exhibit No. 7.)

Mr. CIST: Mr. Connor, you handle Nashville business from Chattanooga—that is, business coming from New York to Nashville—you get it from Chattanooga? What proportion of that business comes from eastern and Atlantic or other roads leading up from Savannah?

Mr. CONNOR: (Witness:) Well, I am not familiar enough with that to answer.

Mr. CIST: Do you get a large proportion or a small proportion or a fair proportion that way?

Mr. CONNOR: (Witness:) The business runs from about north first, and west next, and then probably from Savannah.

Mr. CIST: Is it a fair proportion?

Mr. CONNOR: (Witness:) Yes, sir. So far as percentage is concerned I do not know.

Mr. CLARKE: I will state before closing that I will wire for Mr. Knox and if he can get here we will have him.

Mr. BAXTER: I call Mr. T. A. Davant.

T. A. DAVANT, a witness on behalf of the respondents, having been duly sworn, testified as follows:

Direct examination:

Mr. BAXTER: You are the general freight agent of the East Tennessee road?

383 Mr. DAVANT: Yes, sir.

Mr. BAXTER: Have you any connection with the Memphis and Charleston railroad?

Mr. DAVANT: Yes, sir.

Mr. BAXTER: Who is your assistant freight agent on that road?

Mr. DAVANT: Mr. J. S. Davant.

Mr. *Davant:* Have you at any time lived at Memphis?

Mr. DAVANT: Yes, sir, I lived there for nine months.

Mr. BAXTER: How long since was that?

Mr. DAVANT: Four years ago.

Mr. BAXTER: You are frequently in Memphis to attend to business there?

Mr. DAVANT: Yes, sir.

Mr. BAXTER: Will you please state to the commission, bearing upon the question of whether there is water competition at Memphis, whether that competition controls rates from the East to Memphis?

Mr. DAVANT: The rates via New Orleans from the East to Memphis have always been a source of a great deal of trouble to us. There is a large part of the dry-goods business, such as heavy goods, blankets, domestics and things of that kind which are shipped by the large wholesale houses at Memphis, such as Lowens & Bro., Moore & Co., and others by way of New Orleans at rates which we have never been able to meet.

The rates today from New York to Memphis by our line, for instance, via Norfolk are $1.00, 85, 65, 45, 38, 35; via New Orleans and river 65, 60, 45, 33, 28, 27. These rates are agreed upon by the agency in New York and this gross traffic goes by way of New Orleans. We do not control it at all. That also includes cotton goods and staple groceries and such things as that, which in Memphis amounts to a very large tonnage. Of course, I have no statements to show specifically the amount of the tonnage which comes via New Orleans but I think we could get them for the commission. That it is large there is no doubt. The fact is, it is the higher class

of goods only that we handle and we do that because the time is better and the interest is somewhat less by our line than via New Orleans.

Mr. BAXTER: Do you know that there is at Memphis, at all seasons of the year, boats plying the Mississippi river between New Orleans and Memphis engaged in carrying traffic of this kind?

Mr. DAVANT: Yes, sir; those boats are regularly in the trade—three or four lines.

Mr. BAXTER: Do you think you can be able to furnish the commission the amount of that traffic?

384 Mr. DAVANT: There is only one way we can get that information and that is from the receivers of the goods at Memphis and I think it very probable we can get it from them. Of course they have their receipts showing the routes by which the goods were shipped.

Mr. BAXTER: There is no way of getting it officially?

Mr. DAVANT: No, sir.

Mr. CLARKE: Could you not show the number of lines of steamers and the number of steamers in the lines, number of trips they make, etc.?

Mr. DAVANT: There will be no difficulty about that.

Mr. BAXTER: Is that an actual and present force at all times, the competition between the various carriers that go there?

Mr. DAVANT: It is more savage right now than it has been for some time.

Mr. BAXTER: Do you know it prevents you from getting business and controls your rates to the extent you have named?

Mr. DAVANT: Yes, sir.

Cross-examination:

Mr. CONNOR: When you say there is water competition what do you actually mean by the word "competition"?

Mr. DAVANT: I mean there is a river from New Orleans in the first place, and——

Mr. CONNOR: The competition that occurs between you, what do you mean by that competition?

Mr. DAVANT: I mean by that, working for the same business. Very frequently the boats get it and we do not.

Mr. CONNOR: Suppose you carry for the same rate, would that be competition?

Mr. DAVANT: That would be competition.

Mr. CONNOR: And then if you agreed upon regular rates, a difference in a water rate and the all-rail rate, you would call that competition but still you would be agreed on those rates?

Mr. DAVANT: The agreement is regulated by it.

Mr. CONNOR: Then it is a question of who can get the most traffic. As I understand the question, you and the agents of the steamship companies agreed upon certain differentials and that you are not cutting their rates?

Mr. DAVANT: I went further than that. I stated that on the lower class of goods we did not make any effort to get it.

Mr. CONNOR: But still it is not a matter of cutting each other's rates. You agree to give them a differential?

385 Mr. DAVANT: Yes, in order to avoid the cutting of rates.

Mr. CONNOR: There is no competition but agreed differentials by which both are benefited?

Mr. DAVANT: In the absence of such an agreement there would be competition that would be ruinous to both parties.

Mr. CONNOR: You have agreed upon those differentials and that actually today there is no controversy as to rates to Memphis, but the controversy is as to who will get the most tonnage?

Mr. DAVANT: Let me explain that. The rate to Memphis is $1.00 and that is as high as it can be made; if we go higher than that we get no business at all.

Mr. CONNOR: That is, you and the boat would not agree?

Mr. DAVANT: The boats come and say to us—we are willing to carry business to Memphis for so much and we will not go below that, unless you force us to do it. We say we will agree to maintain our rates so much higher than yours if you will give us some business of the higher classes.

Mr. CONNOR: Then it is very clear that you and the steamship companies have agreed upon certain differentials and that you are not cutting each other's rates but are simply working for the tonnage?

Now, as to earnings. Comparing the carriage of the heavy goods by the steamships and your carrying the high-class goods on quicker time, do not you make more money than the steamships?

Mr. DAVANT: Yes, sir.

Mr. CONNOR: I mean in total earnings. Do you not get more money out of the freight to Memphis?

Mr. DAVANT: We carry at $1.00 and the boats at 65 cents.

Mr. CONNOR: Now, suppose both of you earned $100,000—gross earnings—which would make the most profit?

Mr. DAVANT: I could not answer that question.

Mr. CONNOR: Do you or do you not find a profit in the hauling of Memphis freight at the rates you do? Do you find a profit in the hauling of that freight?

Mr. DAVANT: Mr. Connor, you have had experience enough to know that the profit in transporting freight is a pretty hard thing to arrive at. On general principles we assume that there is a margin of profit in the rate of $1.00.

Mr. CONNOR: Tell me whether or not there is profit in it?

386 Mr. DAVANT: I have answered in a general way. If we did not think there was some profit in it we would not do it.

Mr. CONNOR: There is a profit?

Mr. DAVANT: Yes, sir; there is a profit.

Mr. BAXTER: This class of goods upon which you refuse to compete with the boats at all, you could not carry at their price and realize any profit, could you, and therefore you do not attempt to carry it?

Mr. DAVANT: Yes, sir.

Mr. BAXTER: Is it not the presence of that competition, whatever its nature, that forces you to put the rate at $1.00?

Mr. DAVANT: Yes, sir.

Mr. CONNOR: Do you not frequently carry empty cars to Memphis to load them back?

Mr. DAVANT: We haul them part of the way.

Mr. CONNOR: But you know that it is the history of all railroading that you have to haul cars empty?

Mr. DAVANT: It is the history of the Memphis and Charleston road that the tonnage is pretty well balanced.

Com'r MORRISON: We will now adjourn until 10 o'clock tomorrow.

Accordingly at 10 minutes past 5 p. m. the commission adjourned.

KNOXVILLE, TENN., *Dec'r* 31*st*, 1890.

Interstate Commerce Commission, Washington, D. C.

GENTLEMEN: I wish to add to my testimony given in the case of The Chattanooga Board of Trade *vs.* East Tennessee, Virginia & Georgia Railway Company *et al.* in the matter of the following question and answer:

I was asked by Mr. Baxter this question: "Do you think you can be able to furnish the commission the amount of that traffic?" I answered: "There is only one way I can get that information, that is, from the receivers of goods at Memphis. I think it very probable I can get it from them." I have from several of the leading merchants of Memphis information of the following purport:

B. Lowenstein & Bros., (wholesale and retail dry-goods merchants), whose freight bills will probably aggregate sixty or seventy thousand dollars per annum; that fully four-fifths of their business come to Memphis by way of New Orleans from eastern points.

387 From George Arnold Grocery Co., that over three-fourths of their freight from eastern points comes by way of New Orleans.

Lemmon & Gale Co., that the great bulk of their goods for the past four or five years from eastern points has come by the water route because better rates were obtained than by the Virginia & Tennessee air line.

From the Oliver Finnie Grocery Co., that one-third of their business from eastern points for the past five or six years has come by way of New Orleans of a lower rate of freight.

From Brooks & Cole (merchandise, brokers & manufacturers' agents), that fully one-half of their shipments from eastern points come to Memphis via New Orleans.

From Porter, McRae & Co. (wholesale grocers & commission merchants); that about one-half of their freight from eastern points has come by way of New Orleans, Mobile and Savannah because of lower rates than via all rail.

From the superintendent of the Anchor Line steamers; that for four years past this line has carried from twelve to fifteen hundred

tons of freight per annum from eastern cities by way of New Orleans, all water.

I believe the foregoing, although gathered in an unofficial way or from unofficial statistics, is a fair representation of the actual condition of the water competition at Memphis, as showing that the rail routes are controlled in their rates by the presence of the actually compelling force of this water competition.

Respectfully, &c.,

(Signed) T. A. DAVANT,
General Freight Agent, E. T., V. & G. R'y Co.

Subscribed and sworn to before me, this 1st day of January, 1890, at Knoxville, Knox county, Tennessee.

(Signed) DAN'L KELLY,
Notary Public.

Interstate Commerce Commission.

OFFICE OF THE SECRETARY,
WASHINGTON, *January* 10, 1891.

G. C. Connor, Esq., secretary board of trade, Chattanooga, Tenn.

DEAR SIR: Herewith enclosed please find statement furnished by T. S. Davant, general freight agent, East Tennessee, Virginia & Georgia Railway Company, to be appended to his evidence in your case. 388

Very respectfully, ——, *Secretary.*

Second day.

The commission met pursuant to adjournment at 10 o'clock a. m.

Present: Commissioners and counsel heretofore noted.

Com'r MORRISON: Gentlemen, are you ready to proceed this morning? Mr. Baxter, I believe the case was with you.

Mr. BAXTER: I will call Mr. George R. Knox.

GEORGE R. KNOX, a witness on behalf of the respondents, having been duly sworn, testified as follows:

Direct examination:

Mr. BAXTER: Are you general freight agent of the Nashville & Chattanooga road?

Mr. KNOX: Yes, sir.

Mr. BAXTER: How long have you occupied that position?

Mr. KNOX: Four years.

Mr. BAXTER: You were connected with the road before that?

Mr. KNOX: Yes, sir.

Mr. BAXTER: Where do you reside?

Mr. KNOX: In Nashville.

Mr. BAXTER: Have you lived there during the period since you have been connected with the road?

Mr. KNOX: Yes, sir.

Mr. MAXTER: Are you acquainted with the basis upon which rates to Nashville are made as compared with Chattanooga?

Mr. KNOX: Yes, sir.

Mr. BAXTER: Please state to the commission the basis upon which rates are made and the reasons that control the making of them.

Mr. KNOX: You refer to rates from eastern cities?

Mr. BAXTER: Yes, from New York, Philadelphia, Boston, and Baltimore.

Mr. KNOX: The rates from eastern cities to Nashville are based on the trunk-line rates to the Ohio River points through Pittsburg, Cincinnati, Louisville, Evansville, or Cairo, as the case may be.

389 Mr. BAXTER: Do all those points have the benefit of water competition in the making of trunk-line rates?

Mr. KNOX: The rates from eastern cities to Ohio River points are not controlled by water competition. Business by the trunk lines is done upon the mileage basis.

Mr. BAXTER: How are the rates to Nashville made?

Mr. KNOX: To Nashville the rates are made by adding certain rates charged by the Louisville & Nashville from Cincinnati to Nashville. Those rates are made by the Louisville & Nashville road. They necessarily have to consider in fixing those rates the rates by river in competition with them. The routes through Chattanooga then work the same rates as the routes through Louisville.

Mr. BAXTER: Would it be possible to charge a higher rate to Nashville?

Mr. KNOX: The lines working through Chattanooga, might, of course, raise their rates but it would result in those roads losing all of that business.

Mr. BAXTER: What is the water competition at Nashville—is it actually present?

Mr. KNOX: Many years ago, in fact to go back a little in general history, Nashville had through lines of boats to New Orleans, Pittsburg, St. Louis, Memphis, Cincinnati, Evansville and Louisville before the day of railroads. As a boy I have been there and have seen large 1,500-ton steamers lying alongside their docks. In fact, when the Nashville & Chattanooga road was constructed in 1849 and 1850 it brought its rails by river. Everything was brought by river.

Since the war we have had several struggles, at various times with the river competition. Some years after the war there was a through line of boats from Cincinnati. By constant struggling this through line of boats was kept up for a long time, but those through packets gradually dropped out and other lines took their place. After that we did not have so much trouble but constantly kept adjusting our rates so as not to offer inducements to use the river. Although within the last two years we have begun to have considerable trouble from St. Louis to Nashville on such things as stoves, white lead, etc. The boats have cut the rates half in two sometimes. Then there are shipments by water

of fence wire, furniture, nails, and all sorts of miscellaneous goods from Ohio River points and they make the rates so low that the roads do not try to meet the competition but they are letting it come by the river rather than reduce rates. Of course there is a limit beyond which we cannot go.

390 Mr. BAXTER: You say you adjust the rates with a view to keep out river competition as far as possible?

Mr. KNOX: As far as possible that has been our intention, but during the last two years they have taken a fresh start in some way.

Mr. BAXTER: State if you know of any St. Louis house that has moved his establishment to Nashville.

Mr. KNOX: The Collier White Lead and Oil Company from St. Louis have established a branch house in Nashville, and they ship to Nashville by river and make that their distributing point to the South, on account of the low river rates

Mr. BAXTER: Do you know anything about the route of business from eastern points that is affected by water?

Mr. KNOX: My chief clerk a day or two ago heard that friends of his in Nashville were bringing goods by water. They would bring them to Pittsburg and then by river from there.

Mr. BAXTER: Is there any difference in the water transportation to Nashville now than there was before the war, before the railroad went in there? Is there not the same condition of water as there was there then?

Mr. KNOX: About the same, but the Government has done a considerable amount of work below Nashville in dredging the channel and so forth.

Mr. BAXTER: There has been Government work which has increased the facilities and not decreased it?

Mr. KNOX: Yes, sir.

Mr. BAXTER: Do you know what the river rates are from Cincinnati and Louisville to Nashville, all water?

Mr. KNOX: The general freight agent of the Cumberland line of boats informs me that on general merchandise they are charging from Cincinnati and Louisville to Nashville 15 cents, and from Evansville to Nashville 10 cents.

Mr. BAXTER: What is the railroad tariff as compared with that?

Mr. KNOX: It is a good deal higher and as a consequence I think that is the reason why so much of the merchandise business is coming by river. The rail rates are too high as compared with the boats to hold the business.

Mr. BAXTER: Do you know how many different routes there are from the East through Chattanooga to Nashville? Name them.

Mr. KNOX: There is the Virginia, Tennessee & Georgia or the line through Norfolk; the Great Southern Dispatch; the Piedmont air line through Paint Rock and Chattanooga; the Great Southern freight line of Savannah, and a similar line via Charleston.

391 Mr. BAXTER: Then, if the rate from eastern points to Nashville were raised, would it involve all those southern lines

going out of that traffic and throwing it to the trunk lines coming in the opposite direction?

Mr. KNOX: That is my opinion, but I could only tell by experience, I think that is the way it would work.

Mr. BAXTER: If they do not carry them for 91 cents through Chattanooga they would not be able to carry at all on the present basis of rates?

Mr. KNOX: Not so long as 91 cents is the rate by the trunk lines, and the Louisville & Nashville road.

Mr. POPE: I would like to ask if all these lines through Chattanooga abstained entirely in quoting rates from eastern cities to Nashville, if, in your judgment, the rates to Nashville would be advanced by the trunk lines?

Mr. KNOX: I do not think so.

Mr. POPE: Your experience authorizes you to arrive at that conclusion?

Mr. KNOX: Yes, sir.

Mr. POPE: The official classification is applied to Nashville business?

Mr. KNOX: Yes, sir, west bound.

Mr. POPE: And business to Chattanooga is worked on the Southern Railway & Steamship Association classification?

Mr. KNOX: Yes, sir.

Mr. POPE: You have noticed marked differences and dissimilarities in those two classifications I presume?

Mr. KNOX: Yes, sir.

Mr. POPE: Suppose that the classifications were uniform, and traffic was worked from eastern cities to Chattanooga on one classification, would not a great many of irregularities in rates be eliminated in your judgment?

Mr. KNOX: To the extent that they would overcome discrepancies in trunk-line rates to Ohio River points and Southern Railway classification to southern points. I would like to state that the real underlying cause of this trouble is due to the fact that the trunk-line rates are made on a very much less per ton per mile basis than rates on the southern roads are made owing to the fact that the trunk-line tonnage is very much greater than the tonnage of the southern roads. Necessarily, therefore, when those two systems of making rates from the East into this country—when they come together, there must be a break, it is unavoidable.

Owing to these boats on the Ohio, from Louisville to Nashville, the Louisville & Nashville road groups Nashville with Ohio River points, or western points, while the southern roads have grouped with southern points.

392 The only radical cure would be for the southern lines to adopt the same per ton per mile basis as the trunk lines, but this is not practicable. Another solution would be for the trunk lines to advance their rates to the southern basis, but they would not think of doing that. The lake and canal competition would not permit of that.

It seems to me that this particular embarrassment must occur in

southern Kentucky and Tennessee. I do not see how it is possible to avoid a break somewhere.

Mr. DANIELS: Is that your argument or testimony?

Mr. KNOX: I am giving a reply to a question asked me.

Mr. POPE: I would like to ask for your knowledge as to how much eastern traffic—how much of eastern commodities is Nashville sending into the territory south of Nashville, say within 50 miles of Chattanooga, or 100 miles? In eastern cities' commodities?

Mr. KNOX: I did not quite catch your question.

Mr. POPE: About how much business do you consider Nashville is doing in eastern cities' commodities in a territory within 100 miles or less of Chattanooga?

Mr. KNOX: I have never seen any statistics on that question.

Mr. POPE: Your road would naturally handle that business?

Mr. KNOX: Yes, sir. Recently some of the Nashville merchants told me that they could not meet Chattanooga business. But I have not looked into the matter. I have told them that I gave the same rate from either place for equal distances over our line.

Mr. POPE: Is it not within your experience as a general freight agent that complaints of that kind are relatively made from merchants in different markets?

Mr. KNOX: The Nashville merchant selling towards Louisville and Evansville complains that he operates at a disadvantage.

Mr. POPE: You have the same complaint in regard to St. Louis?

Mr. KNOX: Yes, sir.

Mr. POPE: Chattanooga complains naturally that Nashville shuts her out?

Mr. KNOX: Chattanooga has not made such complaint to our road. I have not had my attention drawn to it anyway. As I said in making rates for traffic we make exactly the same rate for the same distance from either end of our line. Chattanooga has the same rate for 100 miles as Nashville, and, therefore, either of them has
393 an equal opportunity to do business. Chattanooga, perhaps, knowing that, has made no complaint that I know of.

Cross-examination:

Mr. CONNOR: On that last point before it gets out of your mind. Do you affirm that the rate to a place like Jasper would be the same on eastern freights to Nashville merchants, plus the local, that it would be to Chattanooga at $1.14 plus the local to Jasper?

Mr. KNOX: We do not make the through rates from eastern cities to Nashville.

Mr. CONNOR: If you add the local to Jasper to the New York rate; which would be the higher?

Mr. KNOX: I have not figured that.

Mr. CONNOR: But a moment ago you stated that they were no higher.

Mr. KNOX: That was not my statement. I was speaking of a Nashville merchant who said he could not compete at the Sequatchie river.

Mr. CONNOR: The remark you made then has no reference to eastern freight, but to Chattanooga local freights?

Mr. KNOX: I was speaking then of local rates; that was in reply to a question as to Chattanooga making complaint.

Mr. CONNOR: You say that rate to Nashville from eastern seaboard points is made by adding the rate over the Louisville & Nashville road to the trunk-line rate through Cincinnati or Louisville.

Mr. KNOX: Yes, sir.

Mr. CONNOR: Do you know what the rate is on first-class freight from the city of New York to Cincinnati?

Mr. KNOX: It is 65 cents.

Mr. CONNOR: And what is it from New York to Nashville.

Mr. KNOX: 91 cents.

Mr. CONNOR: What is it from Cincinnati to Nashville?

Mr. KNOX: I do not recall that.

Mr. CONNOR: If it is 65 cents to Cincinnati, then it will leave 26 cents from Cincinnati to Nashville?

Mr. KNOX: It is 91 cents over the trunk lines. The trunk-line rate to Louisville is 75 cents, and they add the rate to Nashville to that.

Mr. CONNOR: That would be 26 cents to Nashville from Cincinnati, or 16 cents from Louisville?

Mr. KNOX: They make it by adding 16 cents to the trunk-line rate to Louisville.

394 Mr. CONNOR: The difference is 26 cents from Cincinnati?

Mr. KNOX: Yes, sir.

Mr. CONNOR: And that would be the Louisville & Nashville rates?

Mr. KNOX: That would depend upon how they divide that. It might figure 26 or 25½ cents. Practically they would get that.

Mr. CONNOR: Do you know how much per ton per mile a rate of 91 cents from the city of New York to Nashville would be?

Mr. KNOX: By what route?

Mr. CONNOR: By that route—by the trunk line and the Louisville & Nashville.

Mr. KNOX: I have not figured it out. By that route it does not pass over our road.

Mr. CONNOR: I simply want your information as an expert.

Mr. KNOX: It is nearly a cent a mile.

Mr. CONNOR: Do you know whether or not the 26 cents is the same rate per ton per mile for the distance between Cincinnati and Nashville, as the 65 cents is between the city of New York and Cincinnati?

Mr. KNOX: I do not.

Mr. CONNOR: You do not know it is not so, do you?

Mr. KNOX: No; I do not.

Mr. CONNOR: You do not affirm that the rate from Cincinnati to Nashville is merely an arbitrary with the Louisville & Nashville, do you?

Mr. KNOX: It has been my understanding for many years, that the Louisville & Nashville fixed certain arbitrary rates from Cin-

cinnati and Louisville, which applied to all their eastern connections alike. That is my information. I cannot state it as a fact.

Mr. CONNOR: You do not know that it is not a prorate of the entire rate of freight on the entire mileage?

Mr. KNOX: Well, a moment's calculation would determine that. I do not know it now.

Mr. CONNOR: You do not know that the rate from the city of New York to the city of Nashville, via Cincinnati or Louisville of 91 cents is a prorate of the entire route?

Mr. KNOX: I do not know that.

Mr. CONNOR: You say that the river has had a very controlling influence in your experience in fixing the rate from the city of Louisville to Nashville?

Mr. KNOX: Yes, sir.

Mr. CONNOR: And that if the road were to advance the
395 rate to Nashville that a large portion of the freight would be diverted from its present channels and would go by water.

Mr. KNOX: I think it would.

Mr. CONNOR: Do you know whether the Southern Railway and Steamship Association has ever made a demand upon the Louisville & Nashville to advance rates to Nashville?

Mr. KNOX: I do not now recall anything of the sort; but it may have been.

Mr. CONNOR: Are you certain you do not recollect when any demands have been made to advance the rate?

Mr. KNOX: No, because those demands would not pass through our office.

Mr. CONNOR: As general freight agent of the Nashville and Chattanooga railroad do you not attend the meetings of that association?

Mr. KNOX: I frequently attended them.

Mr. CONNOR: And you have no recollection of ever having heard during those meetings that such a demand was made?

Mr. KNOX: I have not heard of it.

Mr. CONNOR: Have not officially heard of it?

Mr. KNOX: I have heard at times that there were differences between the East Tennessee and the Louisville & Nashville, but as to what the details were has not come to my knowledge.

Mr. CONNOR: The Southern Railway & Steamship Association would know about the river transportation when such matters came up?

Mr. KNOX: Yes, sir.

Mr. CONNOR: And yet you think it is possible that no such demands were made?

Mr. KNOX: No, sir. I said I did not know anything about it. I said it could have been so without my knowing it.

Mr. CONNOR: About this water rate that is so potent to the city of Nashville. How does that water line come from the city of Cincinnati? Tell us the names of the rivers.

Mr. KNOX: Well, the Ohio river runs past Cincinnati to Cairo, and then the Cumberland river passes Nashville.

Mr. CONNOR: How many months of the year can boats run from Cincinnati to Nashville?

Mr. KNOX: I am not so familiar with the Ohio river as I am with the Cumberland river. Usually from eight to nine months in the year, although during the past two years they have been able to run ten or eleven months.

396 Mr. CONNOR: You would feel confident then that they would be able to bring freight nine months in the year?

Mr. KNOX: Of course some years the river is open more than others.

Mr. CONNOR: And for three months out of the twelve months they could not bring freight from Cincinnati and Louisville to Nashville by water?

Mr. KNOX: I do not think they could.

Mr. CONNOR: Would you think then that those rates would control the matter?

Mr. KNOX: Yes, I think so, because it is practicable for merchants who do a large business to make arrangements ahead for carrying their traffic.

Mr. CONNOR: How much freight comes from eastern seaboard points by water to Nashville?

Mr. KNOX: By what, water?

Mr. CONNOR: By the water route you have described.

Mr. KNOX: I think little or none of the eastern business comes that way. But there has been considerable business coming that way originating at Ohio River points.

Mr. CONNOR: From eastern seaboard points is the question we are asking about. How much of that freight is coming over the waterway?

Mr. KNOX: Outside of this queensware business I do not know of any.

Mr. CONNOR: How much has come during the past two years to the best of your information?

Mr. KNOX: So far as I know there is little or none.

Mr. CONNOR: For five years past?

Mr. KNOX: That is probably true for five years. But I would like to add that it is due to the fact that we have tried to keep the rate at a point where they would not use the river.

Mr. CONNOR: Is there any connection between these boats as to carrying freight with the railroads?

Mr. KNOX: There are no contracts with them.

Mr. CONNOR: Is there any connection that would influence them in regard to making rates?

Mr. KNOX: None whatever. Whatever business they bring we charge them our regular rates to Nashville.

Mr. CONNOR: And they made no agreement with you to do certain things as a competing line?

Mr. KNOX: No agreement with us. No agreement at all.

Mr. CONNOR: No understanding?

Mr. KNOX: No.

Mr. CONNOR: They do not under any circumstances
397 feel bound to make a rate because of any understanding with you?

Mr. KNOX: We have no agreed rates with the boats at all.

Mr. CONNOR: They have no trouble in their mind because of any understanding they have with the officers of your roads?

Mr. KNOX: Not that I know of.

Mr. CONNOR: As a general freight agent, and a thoroughly expert one, are there not differentials always agreed upon between water transportation lines and all-rail lines?

Mr. KNOX: Not always; sometimes it is and sometimes not.

Mr. CONNOR: It is general- the case?

Mr. KNOX: No, sir; so far as my observation goes between water carriers and rail carriers there have been many attempts to make arrangements, but they amount to little.

Mr. CONNOR: For instance, suppose a question came up between the all-rail route to Chattanooga from the city of New York and the part-water and part-rail route, would the question of insurance enter into that?

Mr. KNOX: Where an all-rail line competes with a part-water and part-rail line usually agreements are entered into. The rail part of the rail and water line can enforce such an agreement but where one is rail and one water, the all-water carrier is a pretty hard man to hold.

Mr. CONNOR: But where there is a contract for insurance that would be in the nature of a differential would it not?

Mr. KNOX: Yes, sir.

Mr. CONNOR: You are thoroughly acquainted with the figures and volume of business. What percentage, in your judgment, of the entire eastern business to Nashville passes over your road?

Mr. KNOX: That is rather a hard question to answer for the reason that I have never seen any statement of what came in over the other roads. I can only state in a general way. What I state is from general observations. It is variable. Sometimes those large Nashville houses will throw all the business to the northern routes. Recently one of the largest boot and shoe houses in Nashville took offence and threw their business to the Merchants' Despatch. It is very variable. Take the average of the lines through Chattanooga, the southern routes, we probably do about 50 per cent. of that business, probably a little more.

398 Mr. CONNOR: It might be 60 per cent.?

Mr. KNOX: Yes, sir; it is all guesswork.

Mr. CONNOR: You know you have seen this report of the Southern Railway & Steamship Association of tonnage of the various lines to Nashville?

Mr. KNOX: I have not seen that lately, as I have not been a member of that association for some time. While I was a member they sent me the statements.

Mr. CONNOR: Do they give the tonnage?

Mr. KNOX: Yes, sir; and I presume it is about correct.

Mr. CONNOR: And the railroads report to the commissioner?

Mr. KNOX: They take the billing of the lines delivering to us and get the data.

Mr. CONNOR: Except as to clerical errors it is about correct?

Mr. KNOX: I think so.

Mr. CONNOR: You say that 40 per cent. comes over the trunk lines and 60 per cent. over the southern routes of the volume of business from the East to Nashville?

Mr. KNOX: I said that so far as I was able to give opinion from general observation, taking one year with another, I thought probably 50 per cent. came by the southern routes and 50 the other way. It is a good deal of a guess in giving those figures.

Comm'r MORRISON: Do you mean by the southern routes, the routes through Chattanooga?

Mr. KNOX: I mean *the* working through Charleston, Savannah, and Atlantic seaports, passing through Chattanooga.

Mr. CONNOR: That is all.

Mr. CLARK: I believe your road only runs to Chattanooga?

Mr. KNOX: Yes, sir.

Mr. CLARK: You have nothing to do with making rates from eastern points to Chattanooga?

Mr. KNOX: No, sir; nothing at all.

Mr. CLARK: You do not participate in them?

Mr. KNOX: Well, there may be an occasional shipment from the East to Nashville. It pays regular rates from Cincinnati or Louisville. We have practically no amount of that business in to Chattanooga.

Mr. CLARK: Major Connor asked you if you would take the through rate to Nashville plus the local that the amount would exceed a similar through rate to Chattanooga plus the local *firm* Chattanooga; if that was so, it would be due to the through rate, would it not?

399 Mr. KNOX: Yes, sir.

Mr. CLARK: You give each end of the line the same rate?

Mr. KNOX: Yes, sir. We have not made any rates that in any way discriminate against Chattanooga so far as we know.

Mr. CLARK: There has been no complaint?

Mr. KNOX: No, sir. On the contrary the Chattanooga people as far as I have been able to judge are friendly to the N. & C. road. If it had not been for the N. & C. I do not know that there would have been much Chattanooga.

Mr. CONNOR: Do you ever bring any freights from eastern seaboard points from Nashville to Chattanooga? Do you bring any freight from eastern seaboard points through the city of Nashville to Chattanooga?

Mr. KNOX: I stated a moment ago that we might occasionally have such a shipment, but we do not consider we have a line for that business.

Com'r MORRISON: You said that it was possible, or somebody said that some class of goods, or one class at least, could be or had been shipped to Pittsburg by rail, and thence by water to Nashville—it was queensware. What would be the method of shipment? The

boats that would take it at Pittsburg would not take it farther than Cincinnati, would they? There is no line of boats from Pittsburg further down the river than Cincinnati, is there?

Mr. KNOX: Well, my information as to the packet lines on the Ohio now is not sufficient to state positively, but my general information is that it is as you suggest.

Com'r MORRISON: Then if it went by water to Nashville it would go on one boat to Cincinnati, and next on another to Paducah, and thence by the Cumberland boat?

Mr. KNOX: Yes, sir, it is as you explain it to be.

Mr. CONNOR: That is all.

Mr. FITZGERALD: Do you not know the fact that there are towboats on the Mississippi river that run from Pittsburg, which carry merchandise down the river from Pittsburg to Cincinnati?

Mr. KNOX: I have understood that the Wheeling and Pittsburg manufacturers make up tows of glassware and such things for lower river points, but I do not know how frequently those boats run.

Mr. FITZGERALD: You know that they exist?

Mr. KNOX: Yes, sir.

Mr. CONNOR: Do you know it of your own knowledge?

Mr. KNOX: I have heard it.

400 Com'r MORRISON: How about the coal men; have they their own means of shipment?

Mr. KNOX: Yes, sir.

Com'r MORRISON: This business is taken up at Pittsburg and along the river front by these boats; that is not business that comes through from the East?

Mr. KNOX: These goods are generally from Pittsburg.

T. G. RYMAN, a witness on behalf of the respondent-, having been duly sworn, testified as follows:

Mr. BAXTER: Where do you live?

Mr. RYMAN: In Nashville.

Mr. BAXTER: How long have you been there?

Mr. RYMAN: I was born there, and have lived here ten years, and the rest of the time there.

Mr. BAXTER: In what business are you engaged?

Mr. RYMAN: In the steamboat business.

Mr. BAXTER: What connection have you with it?

Mr. RYMAN: I own and control and am general manager of the lower line below Nashville and also the upper line above Nashville.

Mr. BAXTER: Are there boats from Nashville to points down the river?

Mr. RYMAN: We run one boat twice a week to Paducah and one twice a week to Evansville, Ind. And then we have extra boats to use when business demands. We have four boats below, but we only run three regularly.

Mr. BAXTER: How long have you been running that line of boats?

Mr. RYMAN: I have been running one boat or more 17 or 18 years.

Mr. BAXTER: About what portion of the year is the lower Cumberland navigable?

Mr. RYMAN: Ordinarily it is navigable from eight to nine months, but in the past three years it has been navigable I suspect, eleven months in the year.

Mr. BAXTER: Can you state what your rates are from Cincinnati and Evansville to Nashville on merchandise?

Mr. RYMAN: Well, from Evansville it is 10 cents a 100 on heavy goods, on general merchandise. From Cincinnati and Louisville on heavy freights the rate is 15 cents—12 to 15. We have brought some freights as low as 12 cents from Cincinnati. That is brought from Cincinnati by another boat and delivered to us; they
401 reship with us at Paducah, Ky. That is the terminus of our boat that makes two trips a week.

Mr. BAXTER: What is the capacity of your boats?

Mr. RYMAN: We have boats that will carry 375 tons and some that will carry 250—from 250 to 375 tons.

Mr. BAXTER: They make three regular trips a week?

Mr. RYMAN: We do not all the time. In the dull season we do not run but two boats. Part of the time we run three and sometimes in heavy business we run four.

Mr. CLARK: Please state to the court the condition of the boat traffic when the Louisville & Nashville road lowered its rates some years ago, what lines were then running on these rivers and what lines have been discontinued in consequence of that?

Mr. RYMAN: Well, 17 years ago, when I commenced boating in the Cumberland river there was a line of boats from Pittsburg and from Evansville and one from Louisville and occasionally a boat from St. Louis.

Mr. CLARK: Any other regular line from any other points?

Mr. RYMAN: I started in with a local boat to Paducah. There was a line previous to mine. There have always been boats ever since I can remember from Paducah to Nashville and ever since the war there have been boats from Evansville into Nashville.

Mr. CLARK: Have those lines been discontinued?

Mr. RYMAN: Yes, sir, they have all been discontinued.

Mr. CLARK: Is that due to railroad competition in freight?

Mr. RYMAN: Yes, sir, I would think so. That is the cause of it. In other words the facilities of the railroads have been greater and there have been more of them.

Mr. CLARK: I will ask you to state if the rates are something like equal if the shipment does not go by railroad, and if it is not due to the gain in time or insurance or both?

Mr. RYMAN: There is a gain in time and a gain in insurance and in handling. They put it in the car and it goes through. We have to break bulk. The rail has the advantage. It takes several days longer by water.

Mr. CLARK: Now, if the rates were advanced by the railroads state whether you would be of the opinion it would cause the restor-

ing of these lines of boats in consequence of the increased traffic by river?

Mr. RYMAN: If it were increased to any extent there would be through lines from those points again. I would think that. I know it.

402 Mr. CLARK: What is the condition of the Cumberland river now in the way of shipping facilities as compared with former years?

Mr. RYMAN: Well, the Government has put in some dams and has caused a few more inches of water, and they have taken out some rocks and have cut out leaning timber out of the narrow shoots. I think it is better, some little better.

Mr. CLARK: You do not know whether that has enabled you to use the river more in the past two or three years?

Mr. RYMAN: The main cause of that is because we have had more rain in the past three summers than I have known in 20 years before in succession.

Cross-examination:

Mr. CONNOR: You are — thoroughly skilled river captain?

Mr. RYMAN: Yes, sir.

Mr. CONNOR: You say that the river has been navigable for the past three years for nearly eleven months in each year?

Mr. RYMAN: I think so, I might be mistaken about that, but I told you I judged about that. I have a lot of low-water boats we use in low water. We have a lot of boats that run in from 14 to 16 and 18 inches of water and we use them in the summer when it is dry. We used them when the big side-wheel boats that we use in high water are laid up. Our heaviest boats ran nearly all last summer except when laid up for repairs.

Mr. CONNOR: You would not run on an average more than nine months would you?

Mr. RYMAN: Not taking it for 20 years back.

Mr. CONNOR: Now the boats that you can run over there in low water, how much tonnage do you think they carry in low water?

Mr. RYMAN: Our lightest boats?

Mr. CONNOR: The one that runs when the water is low. How much do you think those boats will carry?

Mr. RYMAN: Well, we have one that carries 100 tons. We have low-water boats that will carry 250 tons.

Mr. CONNOR: That is from two to five car-loads of 40,000 pounds each?

Mr. RYMAN: That is in those three months in the summer.

Mr. CONNOR: From two to five car-loads would be about what they would carry—any of those boats during that time?

403 Mr. RYMAN: Most of the boats carry 250 tons.

Mr. CONNOR: How many car-loads?

Mr. RYMAN: Six car-loads.

Mr. CONNOR: No, that would be 12½ cars at 40,000 each, instead of 6, would it not?

Mr. RYMAN: Yes, sir.

Mr. CONNOR: How many car-loads could you haul then in a week during low water?

Mr. RYMAN: Sometimes we could not haul very much. Most of the time we do not carry much freight in low water.

Mr. CONNOR: Would you consider then that your boats in this season would have a controlling influence upon rates by railroad when you could not carry freight?

Mr. RYMAN: Not when it is dead low water, but it is this way. The merchants use our river rates as a check on the railroad and if the road during this low water was to raise their rates because they had the advantage, then their patrons would use our boats more extensively in high water. That is a fact.

Mr. CONNOR: Do you feel that you have a controlling influence as a boatmaster and owner of boats, an actual controlling influence for longer than nine months in a year on an average?

Mr. RYMAN: Yes, sir; I think that in the way I have said, we do.

Mr. CONNOR: Do you think that you could control the rate when you cannot carry the freight?

Mr. RYMAN: We could not carry it in the summer generally, but last summer we could.

Mr. CONNOR: You are the owner of quite a number of boats, are you not?

Mr. RYMAN: Yes, sir.

Mr. CONNOR: Have you any agreement or contract with any railroads as to the making of rates?

Mr. RYMAN: I have not a line of writing with them. I have an agreement with Frank B. Gray, of Clarksville, Tenn. He is my agent there. He is a railroad man and also has a wharf-boat. I have an agreemant with him that I will not cut the eastern rate on tobacco provided he does not raise it too high. I force him to recognize the fact that Clarksville must be considered a river point. I do that because I do not want the competition.

Mr. CONNOR: How much freight do you carry that originates in eastern seaboard points, Boston, New York, Philadelphia and Baltimore? How much of that kind of freight do you carry into the city of Nashville?

Mr. RYMAN: Well, we do not carry a great deal of it.

404 We get some goods consigned to us at Evansville from eastern points.

Mr. CONNOR: What class of goods are they?

Mr. RYMAN: They are box goods generally; sometimes starch and such things from somewhere around there.

Mr. CONNOR: That starch came from the West, did it not? You are not sure it came from eastern points such as New York, Philadelphia & Baltimore.

Mr. RYMAN: No, sir; not the starch, I think; but we once in a while get a shipment from the East, but not much.

Mr. CONNOR: That is all.

Mr. DANIELS: Is it not a fact that what you bring on the river is simply local traffic?

Mr. RYMAN: You mean on our river boats? We have a great deal of reshipment from Cincinnati, Pittsburg, and Wheeling, such freights as iron and glassware, etc.

Mr. DANIELS: You do not compete for any trade from the East?

Mr. RYMAN: We do not have agents to solicit it, but sometimes we get it. Maybe 20 shipments in a year, from eastern cities.

Mr. CONNOR: What do you call eastern cities?

Mr. RYMAN: It occurs just once in a while. The merchants get dissatisfied with the railroads and they ship by water in order to force the railroads down.

Mr. DANIELS: How do you know that?

Mr. RYMAN: Well, they come to my office and have confidential talks with me about that. They say they want to bring the road down, and I consent for this reason, that if I will not make a contract and try to make lower rates to Nashville, they threaten me by saying they will put on a new line of boats. And they would do it, too. I won't go into any contract, but anything that is offered we take. That is the position I have always taken.

Com'r VEAZEY: How much of a rise would there have to be in the rail rates to re-establish the former condition of transportation by river, which you testified about?

Mr. RYMAN: The 15-cent rate out of Cincinnati on heavy goods would have to be raised to from 20 to 25 cents—25 cents. You mean by river or rail?

Com'r VEAZEY: By rail, how much would the increase of the rate by rail have to be to cause the re-establishment of water transportation as it formerly existed?

405 Mr. RYMAN: Taking insurance and everything else into consideration. Is it to be insured by the river?

Com'r VEAZEY: You said that if the rail rate was put up it would drive business to the river.

Mr. RYMAN: There are several things to be considered. If there was back business it would make a difference. But I suppose they could get lumber. Then the steamers would have to get return trips. They used to get iron from the Alabama furnaces. I suppose the railroad would have to charge all the way from 22½ to 27 cents; from 25 to 27 cents, of course there is a difference in classification.

Com'r VEAZEY: Their charge now is about what?

Mr. RYMAN: I do not know.

Mr. CONNOR: 23 cents on first class, is it not?

Mr. RYMAN: It is 22 cents on nails, I think, and 27 to 30 on light goods. If a steamboat could get 25 cents generally and get trips out of Cincinnati to Nashville and then could secure anything at all back, they could make money.

Com'r VEAZEY: I simply wanted to know what amount of lifting up of rates by the railroads would turn the transportation to water, again?

Mr. RYMAN: If the steamboat could get 25 cents on general mer-

chandise, or 20 on heavy, and from 25 to 26 on light goods, the railroads, in order to force the shipper to ship by water, would have to charge more than that amount.

Com'r MORRISON: Then you would want a certain amount of security before you would put in a line of boats; that is, some guarantee that they would not put down the rates again?

Mr. RYMAN: They would do that, I suspect. That is another thing that a boat has to contend with. But my boat and the through boats on the Mississippi and Ohio rivers, on the Memphis line, would meet the competition. We would have something to do with it.

Com'r MORRISON: You have no line except on the Cumberland river, have you?

Mr. RYMAN: No, sir; and we could not live if the rates were any lower. We are working about as cheaply as we can make anything.

Mr. BAXTER: Do you know anything about a line of barges from Pittsburg down the Ohio river?

Mr. RYMAN: I have not been over there this season, but there is usually a tow made up, it frequently runs down to St. Louis and carries this Iron Mountain freight to Pittsburg and takes down general merchandise.

Mr. BAXTER: Do you know anything about the water lines
406 at Memphis from New Orleans, and from Evansville and Pittsburg?

Mr. RYMAN: From Pittsburg to New Orleans?

Mr. BAXTER: No, from Pittsburg to Memphis and from New Orleans to Memphis.

Mr. RYMAN: Well, this barge line that I speak of runs to Memphis from Pittsburg. Then there is a regular packet line from Pittsburg to Cincinnati, and also a regular packet line from Cincinnati to Memphis, and also to New Orleans from Cincinnati.

Mr. BAXTER: Those are lines regularly on the river?

Mr. RYMAN: Yes, sir; when there is water in the river.

Mr. BAXTER: Is the Mississippi river ever unnavigable below Memphis?

Mr. RYMAN: No, sir; I never knew it to be. I have known it to be a little low for big boats, but they always have boats running there.

Mr. BAXTER: Do you know whether they do any considerable amount of trade to and from Memphis?

Mr. RYMAN: I am not posted as to the trade at Memphis. They do some business the entire year below Memphis. I am not as well posted on the Mississippi river as I am on the Ohio and Cumberland.

Mr. BAXTER: Do you know whether or not there is a barge line between Louisville and Cairo on the Ohio river?

Mr. RYMAN: Yes, sir; I read that in their River News.

Mr. BAXTER: They carry very cheaply, at very low rates?

Mr. RYMAN: Yes, sir.

Mr. MOON: Are you telling what you know or what you read? We want to know what you know and nothing else.

Mr. RYMAN: I read that in the River News, which is reliable.

Mr. CLARK: I believe that you said that merchants came to you and told you that if you made any contract with the Louisville and Nashville road, by which you could not compete with them, that they would set up an opposition line?

Mr. RYMAN: I have had that told me more times than once.

Mr. CLARK: And as a matter of fact, that influences you in your feeling about it?

Mr. RYMAN: Yes, sir; my judgment and knowledge of the
407 facts in regard to the river business, and of the nature of men and their desire to make money, &c. I know that would be the consequence and that is the reason I have not made any contract. I have a piece of paper in my possession that I could have signed years ago.

Col. J. W. BARLOW, a witness on behalf of the respondent, having been duly sworn, testified as follows:

Mr. BAXTER: You occupy some position in the United States Government?

Mr. BARLOW: Yes, sir.

Mr. BAXTER: Please state what it is.

Mr. BARLOW: I have the rating of lieutenant colonel in the army—engineer corps.

Mr. BAXTER: Have you been at any time, or are you now, in charge of Government on the lower Cumberland river?

Mr. BARLOW: Yes, sir; I am now in charge of the work on the Cumberland river.

Mr. BAXTER: How long have you been in charge?

Mr. BARLOW: Since March, 1886.

Mr. BAXTER: The lower Cumberland includes all that part of the river from Nashville to its mouth?

Mr. BARLOW: Yes, sir.

Mr. BAXTER: Can you state, Colonel, from any knowledge you have from your official service, that is from statistics and otherwise, the amount of money that has been spent by the Government below Nashville on that river?

Mr. BARLOW: About $265,000 has been expended below Nashville.

Mr. BAXTER: Over what distance on the river is that?

Mr. BARLOW: A little less than 200 miles.

Mr. BAXTER: What has been the character of the improvements?

Mr. BARLOW: Excavation in the bed of the river through rocky reefs and the construction of wing dams at certain places for deepening the water.

Mr. BAXTER: Over what period of time has that money been expended?

Mr. BARLOW: The first improvements were made as far back as

1830, I think, and they have been continued with some interruption up to the present time; the appropriation yearly has been quite small.

Mr. BAXTER: Was there not an intermission between 1838 and 1871, when there were no appropriations made?

Mr. BARLOW: Yes, sir.

408 Mr. BAXTER: Can you state what the appropriations were prior to 1838 and those made since 1871 from official information?

Mr. BARLOW: I have a report here which may possibly give that information, though I have not the full records with me.

Mr. BAXTER: You can give approximations?

Mr. BARLOW: Yes, sir. The official report shows that from 1832 to 1838 Congress made five appropriations aggregating $155,000, for the entire river. Of that, $20,000 was devoted to the river below Nashville, the balance, $135,000, was expended upon the river generally; the records do not show how this was expended. But a portion of it was probably expended below Nashville, and a portion above.

Mr. BAXTER: And since 1871, the statistics are more exact, are they not, the appropriations made since 1871? What have been the appropriations spent below Nashville since then?

Mr. BARLOW: This report is very general and the details are not here, but $265,000, has been appropriated and expended upon the lower river.

Mr. BAXTER: How many appropriations does that cover, about 16 or 18?

Mr. BARLOW: Probably, I have not a complete list, but it is probably something like that. The appropriations have been made, I think, in all the general appropriation bills since 1871 that have been made. They have been pretty regular since that time, 1871, to the present time. During that time I should judge at least 15 or 16 appropriations have been made. In the past 6 or 8 years the appropriations have occurred biannually.

Mr. BAXTER: What character of improvements have been made on the lower Cumberland and have they had the effect of materially increasing the utility of that river for commerce?

Mr. BARLOW: The improvement has not been very great in depth under the system that has been used, and for that reason a new system has been adopted and will be carried out as appropriations will be made. It might be said that the effect of these improvements, these wing dams and excavations, is, perhaps, not as great, apparently as great, owing to the fact that the stream seems to have gradually diminished in the volume of water until within the past three years when a change has occurred and the volume has increased during low water.

Mr. BAXTER: Has the effect been to make it more beneficial as a channel of commerce or less so?

409 Mr. BARLOW: More beneficial.

Mr. BAXTER: You say that now another system has been introduced?

Mr. BARLOW: Yes, sir, slack-water navigation.

Mr. BAXTER: Have any appropriations been made for that purpose?

Mr. BARLOW: Not below Nashville. A survey has been made for this system and plans have been prepared for its adoption below Nashville. Surveys and plans have been made for the adoption of a slack-water navigation below Nashville, but no appropriations for that have been made. The system has been commenced above Nashville.

Mr. BAXTER: Have you recommended appropriations for that purpose?

Mr. BARLOW: I have recommended the adoption of that system.

Mr. BAXTER: I understand then, that you think that the slack-water system will be still more beneficial for the purposes of navigation than the other systems?

Mr. BARLOW: Yes, sir.

Cross-examination:

Mr. CONNOR: Suppose that your recommendation was adopted by the chief engineer and then the appropriation was made, how many years do you suppose it would take to make slack-water navigation of any value?

Mr. BARLOW: That would depend entire- upon the rapidity of the appropriations.

Mr. CONNOR: Suppose you got them in the usual method of Congress and the usual method of engineer's operations?

Mr. BARLOW: I can hardly say what that method would be as applied to a special case. We might get a million dollars a year, or we might get half of that. The estimated cost of such improvement below Nashville is about two million dollars.

Mr. CONNOR: If you got all the money in two years, how many years would it take to finish the work?

Mr. BARLOW: It would be three or four years, not less than four years.

Mr. CONNOR: You have statistics in your office showing the water levels of the river, I suppose, for a number of years?

Mr. BARLOW: Yes, sir.

Mr. CONNOR: What do those figures show as to the average condition of the river for navigation as to the number of months of the year it is navigable?

410 Mr. BARLOW: They show that the river has been interrupted usually some three or four months, in some years not so much.

Mr. CONNOR: The average?

Mr. BARLOW: From eight to ten months of navigation and from two to four months of interruptions. The present year, I believe, has been practically without any interruptions.

Com'r MORRISON: Did I understand you to say that $265,000 had been applicable to the river below Nashville?

Mr. BARLOW: That much has been expended below Nashville.

It included all the money that has been expended on the river according to my reports.

Com'r MORRISON: All of that $265,000 has not been expended below Nashville since 1871?

Mr. BARLOW: Not all of it.

Com'r MORRISON: Your reports do not show definitely what portion of it was thus expended?

Mr. BARLOW: This report that I have with me does not, but I have reports that do.

Com'r MORRISON: Will you please then add to your statement, at your convenience, the exact amount if you have it, that has been expended on the Cumberland river below Nashville?

Mr. BARLOW: Yes, sir.

Mr. BAXTER: We have no other evidence to introduce.

Com'r MORRISON: Is there anything further, Judge Moon?

Mr. MOON: We have one other witness that we would rebutt with, Mr. Drackett, but he seems not to be here. We have no further testimony.

Mr. BAXTER: Either party can file written arguments, I suppose? I understood as much from a telegram I had from the secretary.

Com'r BRAGG: That is our practice.

Com'r MORRISON: We usually allow counsel to make their own arrangements about that.

Mr. CONNOR: We will attend to it then.

Com'r MORRISON: Will it be oral or by brief?

Mr. MOON: I would ask your honors to fix the time for filing the briefs.

Com'r BRAGG: We usually leave that to counsel. At any time they agree.

(After consultation, it was agreed that 30 days should be allowed for the filing of briefs by the plaintiff and 20 days for the respondents to reply and then 10 days after that for the plaintiff to
411 answer the respondents' brief. That is, 60 days in all after the parties have received a copy of the testimony.)

Com'r MORRISON: Then this will dispose of this case for the present, I suppose.

Thereupon, at 12.30 p. m., this case was closed.

EXHIBIT No. 1.

Tables of Distances from New York.

To Nashville, via Pennsylvania and Louisville & Nashville railways:

New York to Philadelphia	91	
Philadelphia to Harrisburg	105	
Harrisburg to Pittsburg	249	
Pittsburg to Cincinnati	312	
Cincinnati to Nashville	295	1,012 miles.

To Chattanooga, via Penn., Cumberland Valley, Shen. Val., N. & W. & E. T.:

New York to Harrisburg	196
Harrisburg to Hagerstown	74
Hagerstown to Roanoke	239
Roanoke to Bristol	150
Bristol to Chattanooga	241—900 miles.

To Chattanooga, via Pennsylvania and Cincinnati Southern railways:

New York to Cincinnati	717
Cincinnati to Chattanooga	335—1,052 miles.

To Chattanooga and Nashville, via Cincinnati, Ohio:

New York to Cincinnati, via Penn. R'y	717
Cincinnati to Chattanooga, via Cin. So.	335
Cincinnati to Nashville, via L. & N.	295
	40 miles.

Showing Chattanooga farther from Cincinnati.

The above tables show that Chattanooga is nearer to New York by 112 miles than is Nashville.

Taking Cincinnati as a basing point Chattanooga's haul would be only 40 miles longer than the haul to Nashville.

EXHIBIT No. 2.

C.—Comparison of Freight Rates.

From Chattanooga, Nashville, Memphis, and Cincinnati to stations on Memphis & Charleston R'y.

Stations.	Miles.	From Chattanooga.				From Nashville.					From Memphis.					From Cincinnati.				
		114 1	**98** 2	**73** 4	**49** 6	Miles	**91** 1	**78** 2	**42** 4	**31** 6	Miles	**100** 1	**85** 2	**45** 4	**35** 6	Miles	**65** 1	**57** 2	**30** 4	**22** 6
Scottsboro.....	56	**155** 41	**134** 36	**99** 26	**67** 18	131	**183** 92	**155** 77	**92** 50	**70** 39	254	**155** 55	**130** 45	**80** 35	**60** 25		**157** 92	**134** 77	**82** 52	**61** 39
Woodville.....	73	**157** 43	**136** 38	**101** 28	**68** 19	155	**181** 90	**153** 75	**91** 49	**69** 38	238	**155** 55	**130** 45	**80** 35	**60** 25		**155** 90	**132** 75	**80** 50	**60** 38
Brownsboro	87	**158** 44	**137** 39	**102** 29	**68** 19	141	**177** 86	**149** 71	**90** 48	**68** 37	224	**155** 55	**130** 45	**80** 35	**60** 25		**151** 86	**128** 71	**78** 48	**59** 37
Huntsville.....	97	**159** 45	**138** 40	**103** 30	**69** 20	130	**131** 40	**105** 35	**67** 25	**48** 17	213	**155** 55	**130** 45	**80** 35	**60** 25		**140** 75	**119** 62	**76** 46	**52** 30
Madison.....	107	**160** 46	**138** 40	**103** 30	**69** 20	136	**165** 74	**138** 60	**83** 41	**63** 32	203	**155** 55	**130** 45	**80** 35	**60** 25		**139** 74	**117** 60	**71** 41	**54** 32
Decatur	122	**162** 48	**139** 41	**104** 31	**70** 21	121	**131** 40	**105** 35	**67** 25	**48** 17	188	**154** 54	**129** 44	**79** 34	**59** 24		**140** 85	**129** 72	**84** 54	**58** 36

This table makes same kind of illustrations as Tables A and B.

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EXHIBIT No. 3.

Comparisons of Freight Rates

From Chattanooga and Nashville to stations on Nash., Cht. & St. L. R'y.

Stations.	From Nashville.					From Chattanooga.				
	Miles	91	78	42	31	Miles	114	98	73	49
		1	2	4	6		1	2	4	6
		147	**123**	**78**	**61**		**142**	**120**	**89**	**63**
Bridgeport	129	50	45	36	30	28	28	22	16	14
		142	**125**	**79**	**62**		**142**	**121**	**91**	**65**
So. Pittsburg	.....	51	47	37	31	34	28	23	18	16
		143	**125**	**79**	**63**		**145**	**124**	**94**	**67**
Jasper	135	52	47	37	32	322	31	26	21	18
		143	**125**	**79**	**63**		**145**	**124**	**94**	**67**
Victoria	143	52	47	37	32	48	31	26	21	18
		143	**125**	**79**	**63**		**145**	**124**	**94**	**67**
Dunlap	161	52	47	37	32	66	31	26	21	18
		141	**123**	**77**	**61**		**144**	**123**	**93**	**67**
Stevenson	113	50	45	35	30	38	30	25	20	18
		136	**118**	**77**	**61**		**148**	**127**	**97**	**70**
Sherwood	97	45	40	35	30	54	34	29	24	21
		134	**116**	**74**	**58**		**150**	**129**	**99**	**72**
Cowen	87	43	38	32	27	64	36	31	26	23
		146	**128**	**82**	**66**		**166**	**145**	**110**	**81**
Sewance	95	55	50	40	35	72	52	47	37	32
		156	**135**	**87**	**71**		**176**	**152**	**115**	**86**
Mont Eagle	101	65	57	45	40	84	62	54	42	37
		133	**115**	**73**	**57**		**153**	**132**	**101**	**73**
Decherd	72	42	37	31	26	69	39	34	28	24
		133	**115**	**73**	**57**		**153**	**132**	**101**	**73**
Winchester	75	42	37	31	26	72	39	34	28	24
		139	**121**	**77**	**61**		**162**	**141**	**108**	**79**
Elora	94	48	43	35	30	91	48	43	35	30
		141	**123**	**77**	**61**		**164**	**143**	**108**	**79**
Fayetteville	112	50	45	35	30	100	50	45	35	30
		131	**113**	**67**	**48**		**159**	**138**	**103**	**69**
Huntsville	20	40	35	25	17	97	45	40	30	20
		129	....	**70**	**55**		**157**	**136**	**105**	**76**
Tullahoma	69	38	33	28	24	82	43	38	32	27
		136	....	**73**	**57**		**159**	**138**	**104**	**75**
Manchester	81	45	40	31	26	94	45	40	31	26
		141	.....	**82**	**61**		**164**	**143**	**108**	**79**
McMinnville	103	50	45	40	30	116	50	45	35	30
		151	.....	**87**	**69**		**174**	**153**	**118**	**87**
Sparta	130	60	55	45	38	143	60	55	45	38

The figures in light give local rates. The figures in black give local rates plus the rates from New York. For illustration:

New York to Nashville, 1 class $0.91
New York to Tullahoma, " $0.38

$1.29

EXHIBIT No. 4.

Before the Interstate Commerce Commission.

THE BOARD OF TRADE OF CHATTANOOGA
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY *et al.*

The Pennsylvania Railroad Company, one of the respond-
414 ents in the above-stated case, for answer to the complaint filed therein, says:

1. That in respect to the matters contained in the said complaint, it has not violated any of the provisions of the act to regulate commerce.

2. That it carries freight over its line as part of three separate through routes from the North to Chattanooga, Nashville and Memphis, namely:

By way of the Delaware peninsula, via Norfolk, the Norfolk & Western railroad and the East Tennessee, Virginia & Georgia railway.

Via the Pennsylvania railroad, Cumberland Valley railroad, Shenandoah Valley railroad, Norfolk & Western railroad and the East Tenn., Virginia & Georgia railway.

Via its main line to Pittsburg and thence via Pittsburg, Cincinnati & St. Louis railway via Cincinnati.

That it receives its proportion of the through rate for transportation by either of these routes; that such through rates are not fixed by itself, the rates by the first two routes being fixed by an association or corporations known as the Southern Railway & Steamship Association, of which the Pennsylvania Railroad Company is not a member; that it has no voice in the establishment of the rates by such routes, but accepts such rates as the companies, members of such association, direct it to charge; that the East Tennessee, Virginia & Georgia Railway Company and the Norfolk & Western Railway Company are members of such association.

That the rates for the third route referred to above are fixed by the Trunk Line Association, of which this respondent and many other companies are members, and that such rates were deemed by said association to be just and reasonable.

3. That for further specification of the justification of the rates by the associations aforesaid, reference is made to the answers of the other defendants.

Wherefore this respondent prays that said complaint be dismissed.

THE PENNSYLVANIA RAILROAD COMPANY,
By WILLIAM H. JOYCE,
General Freight Ag't.

JAMES A. LOGAN,
Of Counsel for Def't.

STATE OF PENNSYLVANIA, }
City of Philadelphia. }

Before me, the undersigned, personally appeared William H. Joyce, who being sworn, doth depose and say that he is the
415 general freight agent of The Pennsylvania Railroad Company, one of the defendants in this proceeding, and that the foregoing answer of that company is true as he verily believes.

WILLIAM H. JOYCE.

Sworn and subscribed before me this sixteenth day of May, A. D. 1890. Witness my hand and notarial seal.

[SEAL.] AL. P. BURCHELL,
Notary Public.

Tables of Distances from New York.

To Nashville, via Pennsylvania and Louisville & Nashville railways:

New York to Philadelphia	91
Philadelphia to Harrisburg	105
Harrisburg to Pittsburg	249
Pittsburg to Cincinnati	312
Cincinnati to Nashville	295
	1,012 miles.

To Chattanooga, via Penn., Cum. Val., Shen. Val., N. & W. and E. T., V. & Ga. R'ys:

New York to Harrisburg	196
Harrisburg to Hagerstown	74
Hagerstown to Roanoke	239
Roanoke to Bristol	150
Bristol to Chattanooga	241
	900 miles.

To Chattanooga, via Pennsylvania and Cincinnati Southern railways:

New York to Cincinnati	717
Cincinnati to Chattanooga	335
	1,052 miles.

To Chattanooga from Cincinnati	335
To Nashville from Cincinnati	295

Showing the Chattanooga haul only from Cincinnati 40 miles farther.

These tables show to the honorable commission:

Chattanooga is nearer to New York than Nashville by 112 miles.

Even taking Cincinnati as a basing point, it is shown that:
416 Chattanooga is only 40 miles farther from Cincinnati than is Nashville.

EXHIBIT No. 5.

Prorating.

Rates of freight from New York and Cincinnati as follows:

New York to Cincinnati, via Penn. R'y, 717 miles, 1 ton costs	13 20
Cincinnati to Nashville, via L. & N. R'y, 295 miles, 1 ton costs	5 20
Total	$18 40

New York to Nashville, 1,012 miles, 1 ton costs.....$18 20

This rate is prorated thus:

1 ton, 2,000 lbs. at 91c. per 100 lbs. (Nashville)..... 18 20

Prorated:

2,000 lbs. at 65c. (to Cincinnati).....	$13 00	
2,000 lbs. at 26c. (Cin'ti to Nashville).....	5 20	
		18 20

These figures show that the rates from New York to Nashville are prorated over the entire mileage of 1,012 miles from N. Y. to Nashville.

The Chattanooga Rate.

This rate is also a prorate of the entire mileage, but at a higher rate per ton per mile.

1 ton from N. Y. to Chattanooga at 114c.....$22 80

If it was prorated upon the same rate per ton per mile, it would be—

New York to Chattanooga, to Cincinnati.....	13 20	
Cin'ti to Chat.....	5 95	
		19 15

The difference—$3.65—is taken by the road south of the Ohio river, or it is prorated over the entire line. If prorated then
417 the Pennsylvania railway discriminates against Chattanooga by charging a higher rate per ton per mile than it does on freights for Nashville.

It is the rule of rate-making for the shorter lines to name rate.

If that rule is applied to the Chattanooga rates we will receive on 1 cl.:

New York to Chattanooga, via Penn., C. V., S. V., N. & W., E. T., V. & G. R'ys. 900 miles.

2,000 lbs. for 900 miles, .018 per ton per mile, $16.20.

This rate, which is our right under the "shortest line" rule, would give us the advantage of Nashville by $2.00 per ton on 1-class freights.

Estimated Population.

Towns on Alabama Great Southern railway, Chattanooga to Attalla.

Stations.	Population.
Wildwood	25
Morganville	25
Trenton	500
Rising Fawn	800
Sulphur Springs	50
Valley Head	50
Fort Payne	3,000
Collbran	25
Porterville	500
Collinsville	300
Attalla	1,200
Gadsden	4,500
Total, 87 miles	10,970

Towns on Cincinnati Southern railway, Chattanooga to Oakdale.

	Mellville	20
	Daisy	50
	Rathburn	200
	Sale Creek	50
	Coulterville	50
	Graysville	25
	Darwin	200
	Dayton	2,700
	Decatur	500
	Evansville	20
	Spring City	500
	Roddy	20
418	Rockwood	1,800
	Cardiff	50
	Harriman	100
	Crossville	500
	Kingston	1,000
	Wartburg	200
	Emory Gap	20
	Oakdale	100
	Total, 84 miles	8,105

Comparison of Tariffs.

Showing rates now in force on Ala. G. S. R. R., what would be if made on the Cin. So. basis and if made on N. & C. basis.

Chattanooga to—	Miles.	1	2	3	4	5	6	C	D	F
MORGANVILLE	10	15	13	11	9	7	6	5	4	10
On C. S. Basis	10	10	9	8	7	7	6	7	6	14
On N. & C. Basis	*10*	*12*	*10*	*9*	*8*	*7*	*6*	*6*	*5*	*10*
TRENTON	18	23	20	17	14	12	9[2]	8	7[2]	15
On C. S. Basis	18	15	13	12	10	8	7	10	8	16
On N. & C. Basis	*18*	*20*	*16*	*14*	*12*	*12*	*11*	*8*	*7*	*14*
VALLEY HEAD	40	35	30	25	20	18	14[2]	12	10[2]	21
On C. S. Basis	40	24	22	19	15	11	10	10	10	20
On N. & C. Basis	*40*	*30*	*25*	*22*	*20*	*19*	*18*	*13*	*12*	*24*
FORT PAYNE	51	47	40	33	26	24	19[2]	16	13[2]	27
On C. S. Basis	51	25	21	21	15	13	10	10	10	20
On N. & C. Basis	*51*	*32*	*27*	*24*	*22*	*21*	*20*	*14*	*13*	*26*
COLLINSVILLE	66	53	45	37	29	27	22	18	15	30
On C. S. Basis	66	26	25	21	15	13	10	10	10	20
On N. & C. Basis	*66*	*38*	*33*	*30*	*28*	*26*	*24*	*15[2]*	*14*	*28*
ATTALLA	87	57	49	40	31	29	23	19	15[2]	31
On C. S. Basis	87	28	27	23	17	15	12	10	10	20
On N. & C. Basis	*87*	*43*	*38*	*35*	*32*	*29*	*27*	*15[2]*	*14*	*27*
SPRINGVILLE	115	63	55	44[2]	34	32	24[2]	20[2]	17	34
On C. S. Basis	115	40	34	30	24	21	20	20	15	34
On N. & C. Basis	*115*	*50*	*45*	*40*	*35*	*33*	*30*	*15[2]*	*14*	*28*
BIRMINGHAM	143	67	59	44[2]	36	34	25[2]	21[2]	18	36
On C. S. Basis	143	49	40	36	28	24	23	23	15	36
On N. & C. Basis	*143*	*50*	*45*	*40*	*35*	*30*	*30*	*15*	*14*	*28*
WOODSTOCK	172	71	63	50[2]	38	36	27[2]	22[2]	19	38
On C. S. Basis	172	55	44	40	31	26	25	23	15	36
On N. & C. Basis	*172*	*57*	*52*	*47*	*42*	*39*	*35*	*19*	*17*	*34*
TUSCALOOSA	198	73	65	53	39	37	28	23	19[2]	39
On C. S. Basis	198	57	47	43	33	28	27	23	15[2]	38
On N. & C. Basis	*198*	*65*	*60*	*55*	*50*	*47*	*22*	*22*	*20*	*40*
AKRON	224	75	67	54[2]	40	38	28[2]	23[2]	20	40
On C. S. Basis	224	58	51	47	35	30	29	23	17	38
On N. & C. Basis	*224*	*65*	*60*	*55*	*50*	*47*	*42*	*22*	*20*	*40*
YORK	268	79	71	57[2]	42	38	29[2]	24[2]	21	42
On C. S. Basis	268	63	59	51	39	33	32	23	19	38
On N. & C. Basis	*268*	*65*	*60*	*55*	*50*	*47*	*42*	*22*	*20*	*40*
MERIDIAN	295	80	74	58	45	38	30	26	22	45
On C. S. Basis	295	68	61	55	42	35	33	23	19	38
On N. & C. Basis	*295*	*65*	*60*	*55*	*56*	*47*	*42*	*22*	*20*	*40*

419 *Comparison of Rates.*

From Chattanooga and Nashville to stations on the E. T., V. & Ga. R. R.

Stations.	From Chattanooga.					From Nashville.				
	Miles.	**114**	**98**	**73**	**49**	Miles.	**91**	**78**	**60**	**31**
		1	2	3	6		1	2	4	6
		132	**114**	**85**	**57**		**148**	**127**	**95**	**51**
Tyner	10	18	16	12	8	161	57	49	35	20
		136	**118**	**91**	**59**		**150**	**129**	**97**	**56**
Ooltewah	16	22	20	18	10	167	59	51	37	26
		140	**122**	**91**	**61**		**158**	**137**	**103**	**60**
Cleveland	29	26	24	18	12	170	67	59	43	29
		148	**128**	**95**	**64**		**166**	**143**	**107**	**63**
Charleston	41	34	30	22	15	192	75	65	47	32
		148	**128**	**95**	**64**		**166**	**143**	**107**	**63**
Riveville	49	34	30	22	15	200	75	65	47	32
		152	**130**	**96**	**65**		**168**	**144**	**108**	**64**
Athens	56	38	32	24	16	207	77	66	48	33

The figures in light show the local rates, and those in black show the local plus the rates to the cities of Nashville and Chattanooga from New York.

These rates exhibit the startling fact that Nashville merchants can have their goods brought over the E. T., V. & Ga. R'y and over the N., C. & St. L. R'y—through Chattanooga—and can ship them back to Chattanooga and to the stations on E. T., V. & G. enumerated above at less rates (totals) than can Chattanooga merchants. And this extra haul of 151 plus 151 plus 56 miles to Athens, on Nashville 6-class goods, lays them one cent a hundred cheaper in Athens than from Chattanooga—which is a 302 miles shorter haul.

A comparison of the mileage and the rates—and the routes—will afford a fair illustration of the injustice done Chattanooga's commerce.

Some Articles in the 6 Class.

Bags, coffee, glass, bottles, tumblers, arch iron, paints, pickles, rope, soda, prep. wheat, woolen goods, &c.

Table of Distances.

New York to Nashville, via Cincinnati, 1,093 miles.
New York to Chattanooga, via Cincinnati, 1,053 miles.
New York to Chattanooga, via Shen. Valley, 901 miles.
New York to Nashville, via Shen. Valley, 1,052 miles.
New York to Cincinnati, via Penn. R'y, 717 miles.
Cincinnati to Nashville, via L. & N. R'y, 296 miles.
Cincinnati to Chattanooga, via C. S. R'y, 335 miles.
Chattanooga to Nashville, via N., C. & St. L. R'y, 152 miles.
Chattanooga to Memphis, via M. & C. R'y, 310 miles.

420 *River Distances.*

Pittsburg to Chattanooga, via Ohio & Tenn. rivers, 1,375 miles.
Cincinnati to Chattanooga, via Ohio & Tenn. rivers, 908 miles.

Cairo to Chattanooga, via Tennessee river, 505 miles.
Paducah to Chattanooga, via Tennessee river, 456 miles.
Paducah to Nashville, via Cumberland river, 167 miles.
Cincinnati to Nashville, via Ohio & Cumb. rivers, 617 miles.

Freight Rates.

From—	To—	Classes. 1	2	3	4	5	6
New York to	Nashville	91	78	60	42	36	31
"	Memphis	100	85	65	45	38	35
"	Chattanooga	114	98	86	73	60	49
New York to	Cincinnati	65	57	44	30	36	22

Chattanooga pays more on freights from New York than does Nashville, as follows:

Chattanooga higher than Nashville by	23	20	26	31	24	18

The L. & N. R'y charges less from Cincinnati to Nashville (296 miles) than the C. S. R'y charges to Chattanooga (335 miles) as follows:

Only 40 miles' difference but higher as given in line above. This enormous excess the C. S. receives for 40 miles of longer haul.

Classification

Of articles that are dealt in chiefly by Chattanooga merchants.

	Articles.	Classes. 1	2	3	4	5	6	C	D	F
	Ammonia	1		3						
	Antimony			3						
	Bagging (Class A)									
	Bags						6			
421	Baskets	D 1								
	Blankets	1								
	Boots & shoes	1	2							
	Buckets				4	5				
	Candles				4					
	Canned goods				4	5				
	Carpets	1								
	Catsup	1			4					
	Cheese				4					
	China (common)	1								
	China (fine)	D 1								
	Cigars	1								
	Clocks	1								
	Coffee	1			4	5	6			

Confectionery, value lim'd				4	5	
Confectionery (value limited to 20c.)				4		
Crackers					5	
Drugs & medicines	1					
Dry goods	1					6
Earthenware	1	2	3	4	5	
Extracts & essences	1					
Fish			3			
Fixtures (gas)		2				
Food preparations				4	5	
Fruit	1		3	4	5	
Glass (bot, tumb's, chim.)			3		5	6
Glass (window)	1	2	3	4	5	6
Groceries (general)		2				
Hardware	1	2				
Hollow-ware	1		3	4	5	
Iron (agricultural)						
Iron (architectural						6
Iron (bolts, &c.)		2				
Jellies	1	2	3	4	5	
Lemons & oranges	1			4		
Liquors (whiskies, &c.)	1	2	3			
Oilcloth	1	2				
Oysters (canned, &c.)	1			4	5	
Paints	1		3	4	5	6
Paper (wall, &c.)		2		4		6
Pickles	1	2		4		6
Preserves	1	2	3	4	5	
Rope				4	5	6
Slates			3	4		
Soaps		2		4		
Snuff	D1	2				
Soda					5	6
422 Stationery		2				
Stoves & furniture	1		3		5	
Tinware	1		3	4		
Tobacco	1	2	3			
Turpentine	D1	2	3			
Varnish	1	2				
Vegetables (canned)			3	4	5	
Wire				4		6
Wheat (prepared)				4	5	6
Woolen goods		2				
Zinc (sheets)				4		
Zinc (oxide)					5	

Exhibit No. 6.

Charter, constitution, and by-laws. Organized Feb. 24, 1882. Chattanooga, Tenn., 1882. Printed at the Chattanooga Times steam printing house.

Charter.

State of Tennessee, }
Hamilton County. }

Charter of incorporation.

Be it known that M. J. O'Brien, president; W. O. Peeples, first vice-president; C. P. Robertson, second vice-president; I. B. Merriam, secretary; D. J. Pierce, treasurer; T. H. Payne, Filmore Gibson, D. B. Loveman and J. N. Trigg, executive committee, being officers elected January 23, 1882, all citizens of said county and more than twenty-one years of age, are hereby constituted a body politic and corporate, by the style and name of "The Board of Trade of Chattanooga," for the general object and purpose of having and maintaining a board of trade of Chattanooga; for the purpose of collecting, preserving and circulating valuable information relating to the business and progress of the city of Chattanooga, and its commercial connections, and especially the facts relating to the commercial and manufacturing interests; to encourage wise and needful legislation, and to oppose the enactment of laws likely to be prejudicial to commercial and manufacturing interests; to study the workings of our system of transportation upon which our commercial prosperity so largely depends, and endeavor to remedy by all proper means, the defects and abuses existing therein; to secure fair and equitable rates of freight to and from the city, the
423 discontinuance of vexatious and unjust overcharges and prompt settlement of damages on goods shipped; to facilitate the adjustment of differences, controversies and misunderstandings between its members and others; and to strive in all ways to promote the commercial, manufacturing and other industrial interests of the city.

The general powers of said corporation shall be to sue and be sued by the corporate name; to have and use a common seal, which it may alter at pleasure (if no common seal, then the signature of the name of the corporation by any duly authorized officer shall be binding); to purchase and hold, or receive by gift, bequest or devise, in addition to the personal property owned by the organization, real estate necessary for the transaction of the corporate business, and also to purchase or accept any real estate in payment or part payment of any debt due the corporation, and sell the same; to re-establish by-laws and make all rules and regulations, not inconsistent with the laws and constitution, deemed expedient for the management of corporate affairs, and to appoint such subordinate officers and agents, in addition to president, secretary and treasurer, as the business of the corporation may require, designate the name of the

office, and fix the compensation of the officer. The said above-named officers shall constitute the first board of directors. In all elections each member will be entitled to one vote, either in person or by proxy, and the result to be determined by the majority of the votes cast. Due notice of any election must be given by advertisement in a newspaper, or by personal notice to the members, or a day stated in the minutes of the board six months preceding the election. The board shall keep a record of their proceedings, which shall at all times be subject to the inspection of any member.

The corporation may establish branches in any other county in the State.

The board of directors may have the power to increase the number of the directors to ten, if they deem the interest of the corporation requires such increase; and the first or any other board of directors may have the power to elect other members, who, on acceptance of membership, shall become corporators equal with the original corporators.

The board of directors shall have the right to determine what amount of money paid into the treasury shall be a prerequisite for membership; of, if necessary, what amount shall be thus annually paid; and if a failure to pay shall in the discretion of the directors justify, the expulsion of said defaulting member.

424 If said corporation is organized as a literary or educational institution, under the patronage of any Christian or Jewish denomination, the corporation shall have the power to increase the number of directors or trustees, to regulate the mode and manner of appointments of the same on expiration of service, to regulate number, duties and manner of electing officers, either actual or *ex officio;* to appoint executive agencies, and to pass all other by-laws for the government of said institution as may be required by the denomination establishing the same; provided, said by-laws are not inconsistent with the constitution and laws of this State.

The term of all offices may be fixed by the by-laws, the said term, however, not to exceed three years. All officers hold over till their successors are duly elected and qualified.

The general welfare of the society, not individual profit, is the object for which this charter is granted, and hence the members are not stockholders in the legal sense of the word, and no dividends or profits shall be divided among the members.

The members may at any time voluntarily dissolve the corporation by a conveyance of the assets and property to any other corporation holding a charter from the State for purposes not of individual profit, first providing for the corporate debts.

A violation of any of the provisions of the charter shall subject the corporation to a dissolution at the instance of the State.

This charter is subject to modification or amendment, and in case such modification or amendment is not accepted, corporate business is to cease, and the assets and property, after payment of debts, are to be conveyed as aforesaid to some other corporation holding a charter for purposes not connected with individual profit. Acquiescence in any modification thus disclosed shall be determined in a

meeting of the members especially called for that purpose, and only those voting in favor of the modification shall thereafter compose the corporation.

The means, assets, income or other property of the corporation, shall not be employed directly or indirectly, for any purpose whatever, than to accomplish the legitimate objects of its creation, and by no implication or construction shall it possess the power to issue notes or currency, deal in currency, notes or coin, buy and sell products, or engage in any kind of trading, operations, or hold any more real estate than is necessary for its legitimate purposes.

425 Expulsion shall be the only remedy for non-payment of dues by the members, and there shall be no individual liabilities for corporate debts, but the entire corporate property shall be liable for the claims of creditors.

We, the undersigned, apply to the State of Tennessee, by virtue of the laws of the land, for a charter of incorporation for the purposes and with the powers and etc., etc., declared in the foregoing instrument.

Witness our hands the 21st day of February, 1882.

M. J. O'BRIEN.
C. P. ROBERTSON.
D. J. PIERCE.
T. H. PAYNE.
W. O. PEEPLES.
I. B. MERRIAM.
D. B. LOVEMAN.
FILLMORE GIBSON.
J. N. TRIGG.

STATE OF TENNESSEE, }
Hamilton County. }

Personally appeared before me, L. M. Clark, clerk of the county court of said county, M. J. O'Brien, W. O. Peeples, C. P. Robertson, I. B. Merriam, D. J. Pierce, D. B. Loveman, T. H. Payne, Fillmore Gibson, and J. N. Trigg, the within-named bargainors, with whom I am personally acquainted, and who acknowledged that they executed the within instrument for the purposes therein contained.

Witness my hand at office this 22d day of February, 1882.

L. M. CLARK, *Clerk.*

STATE OF TENNESSEE, }
Hamilton County. }

The above application for charter and certificate were filed the 22d day of February, at 10 a. m., entered in Note Book No. 2, page 296, and recorded in Book L, volume II, pages 153, 154 and 155.

Witness my hand at my office in Chattanooga.

H. C. BECK, *Register.*

I, David A. Nunn, secretary of state of the State of Tennessee, do certify that the foregoing instrument, with the certificates of acknowledgment of probate and registration, was filed in my office

for registration on the 24th day of February, 1882, in Corporation Record Book E, in said office, page 159.

In testimony whereof, I have hereunto subscribed my
426 official signature, and by order of the governor, affixed the great seal of the State of Tennessee, at the department in the city of Nashville, this 24th day of February, A. D. 1882.

[SEAL.] D. A. NUNN,
Secretary of State.

STATE OF TENNESSEE, }
Hamilton County. }

The foregoing charter, with certificates of probate and registration in this county, and registration in the office of the secretary of state, attached with the great seal embossed thereon, was returned to me the 25th day of February, 1882, at 2 p. m., and said secretary's certificate and great seal recorded in my office in Book L, volume II, page 155, at the foot of the registration of said charter and certificate.

Witness my hand at office in Chattanooga.

H. C. BECK, *Register.*

Constitution.

Article I.

The name of the association shall be "The Board of Trade of Chattanooga."

Article II.

The officers of the association shall consist of a president, two vice-presidents, secretary and treasurer. Said officers shall be *ex officio* members of the executive committee, and shall be chosen annually by ballot. The president shall not be eligible to two consecutive terms.

Article III.

The executive committee shall consist of the officers, the transportation committee, and five members of the association; said five members shall be chosen annually by ballot.

Article IV.

The officers, the executive committee and committee on transportation shall continue in office for one year, or until their successors are chosen. They shall conduct the affairs of the association. The executive committee shall fill any vacancy occurring in their own board, or in any office or committee of the association.

427 Article V.

All merchants and manufacturers, by paying an admission fee of ten dollars, may become members of this association, by written application and receiving a two-third majority of the votes of the members present at the meeting when the ballot is taken.

Article VI.

Any member violating the by-laws or refusing to pay his dues, which shall not exceed one dollar per quarter, may be dropped from the roll of membership or expelled by a majority of the votes cast at the meeting when his case is brought before the association. But no member shall be deprived of his rights in this association without being first notified of the complaint brought against him and of the meeting when the complaint shall be acted upon.

Article VII.

The regular meetings of the association shall occur on the evening of the first Monday in each month. The executive committee may meet as often as they think proper, but their stated monthly meeting shall take place on the evening of the last Monday in each month.

Article VIII.

Called meetings may be had by order of the president, or upon the written application to him of five members; notice of called meetings must be given each member, and no business can be transacted at called meeting unless recited in the notice calling said meeting.

Article IX.

The officers and the executive committee of this association shall be chosen on the first Monday in January in each year; failing to elect at the regular meeting, the president shall call a special meeting for the purpose of which meeting members must be notified.

Article X.

Ten members shall constitute a quorum of the executive committee, for the transaction of business.

Article XI.

Any member may withdraw from the association by giving notice to the secretary and paying his dues in full to the time of giving said notice.

428 Article XII.

This association shall not create any indebtedness above fifty dollars without the consent of two-thirds of the members present at the monthly meeting when the vote is taken; notice to create such indebtedness must be given in writing at the monthly meeting preceding.

Article XIII.

No alteration or amendment of the constitution shall be made unless the same be proposed at a regular meeting, when, if accepted by a majority vote, it shall be entered upon the minutes and lie over until the next monthly meeting, when it will require the same

tion of two-thirds of the members present before it becomes a part of this constitution.

By-laws.

Article I.

Duties of Officers.

1. The president shall preside at all meetings of the association and of the executive committee, sign all orders on the treasurer, appoint all committees not otherwise provided for, and give the casting vote in case of a tie upon any proposition.

2. The first vice-president in the absence of the president shall perform his duties, and in the absence of both, the second vice-president shall preside, and in the absence of all three a chairman may be chosen.

3. The secretary shall keep a full and accurate record of the proceedings of the association, and give such notices to members as may be required, countersign all orders on the treasurer, carefully file all reports of committees and perform such other duties as may be required of him.

The treasurer shall keep a correct account with each member, receive all moneys due the association, keep a correct account of the same, and pay it out only on the orders of the president, countersigned by the secretary; he shall make monthly statements of his receipts and disbursements to the association.

Article II.

Executive Committee.

The executive committee shall require a good and sufficient bond of the treasurer; it will have charge of the rooms and other
429 property of the association. The committee shall have the right to assess fines against its own members for non-attendance, said fines shall not exceed one dollar for each offence. Expenditures of ten dollars or under may be made by the executive committee, but if the expenditure exceeds ten dollars, it must be referred to the association. The committee shall make monthly reports of their transactions to the association.

Article III.

Transportation Committee.

A committee of three members, know- as the transportation committee, shall be elected by the executive committee at the first meeting after the annual election. It shall be the duty of said committee to secure the best rates of freights possible to and from Chattanooga. Said committee shall also have power to direct the members of the association to ship over any line which in their judgment they think most advantageous. The members of this committee shall be *ex officio* members of the executive committee.

Article VI.

Duties of Committees.

Each committee shall attend promptly to the duties for which it was created. The president, with the consent of the executive committee, shall have power to remove any member or members of appointed committees for neglect of duties, and appoint others in their stead. Each committee shall report to the association at monthly meetings.

Article V.

Membership.

Application for membership must be made in writing at stated meetings; the applicant must sign his name in person, and accompany the application with the fee; the application must be referred to the executive committee and lie over until the next monthly meeting, when it shall be balloted for by secret ballot, and it shall require a two-thirds majority of the members present to elect.

Article VI.

Dues.

Each member shall pay to the treasurer one dollar quar-
430 terly in advance; any members in arrears for six months shall be proceeded against as provided for in article VI of the constitution.

Article VII.

Order of Business.

At all monthly meetings of the association the following order of business shall be observed unless otherwise ordered by the association:

1. Reading minutes.
2. Report of executive committee.
3. Report of transportation committee.
4. Reports of other committees.
5. Report of treasurer.
6. Election of members.
7. Unfinished business.
8. New business.

Article VIII.

No alteration or amendment of these by-laws shall be made unless the same may be made in writing at a monthly meeting, when it shall be entered upon the minutes and lie over until the next meeting, when it shall require a two-thirds majority of the members present.

Officers.

M. J. O'Brien, president; W. O. Peeples, 1st vice-president; C. P. Robertson, 2nd vice-president; I. B. Merriam, secretary; D. J. Pierce, treasurer.

Executive committee: T. H. Payne, D. B. Loveman, J. N. Trigg, F. Gibson, P. Lazard, chairman, M. J. O'Brien; secretary, Prosper Lazard.

Transportation committee: J. S. Martin, W. M. Nixon, J. P. Smartt.

Committee on taxation: I. B. Merriam, W. O. Peeples, T. H. Payne.

Claims and overcharges: C. P. Robertson, J. N. Trigg, F. Gibson.

Committee on laws: D. J. Pierce, T. H. Payne, Prosper Lazard.

Committee on printing: M. J. O'Brien, D. J. Pierce, Prosper Lazard.

Members of board of trade.

Butler & Co.,
Berry, James W.,
Block & Co., M.,
Caldwell, M. M.,
431 Crutchfield & Co.,
Calmus & Schwartz,
Cleage Bros.,
Davidson & Son,
Evans & Co., H. C.,
Ewing Bros.,
Friedman Bros.,
Fleming, P.,
Ford, N. C.,
Fischer & Bro., W. F.,
Nixon & Wester,
Nall & Co., A.,
Nicklin & Morrison,
Merriam & Vann,
Miller, Thos. V.,
Martin & Bro.,
McCall, J. P.,
Matthews, M. H.,
Moore & McMillin,
Miller & Cargill,
O'Brien, M. J.,
Peeples & Bros., W. O.,
Peak, W. F.,
Pyron, J. B.,
Pierce, D. J.,
Payne & Co., T. H.,
Peak, C. S.
Gibson, Lee & Co.,
Ghant Bros.,
Gottschalk, Jas.,
Griffiss, Jno. C.,
Harris, J. W.,
Hamilton & Co.,
Hulse, A. J.,
Heard, G. M. D.,
Hughes & Marquet,
Howard & Glover,
Jackson & Trigg,
Jarnagin, G. H.,
Loveman & Co., D. B.,
Lane & Bro.,
Robertson, C. P.,
Smartt & Oehmig,
Simpson, Sol.,
Snow, T. A.,
Shelton, C. C.,
Seeman & Co.,
Simpson, Joseph,
Thomasson & Son, L. L.,
Thompson, M. D.,
Tankesley, R. M.,
Timothy Bros. & Metz,
Vance & Kirby,
Wassman & Bros.,
Wilson, P. C.,
Warner & Co., J. H.,
Williams, J. T.

Rules for Government of the Executive Committee of the Board of Trade of Chattanooga.

Organization.

The committee at its first meeting after election shall organize by the selection of a vice-president and a secretary in addition to the president, who shall be the president of the board of trade as provided for by its constitution and by-laws.

Duties of Officers.

The president shall preside at all meetings, cast the deciding vote, appoint committees, assess fines, and perform all other executive duties. In the absence of the president the vice president shall preside. When the president and vice-president both are absent a chairman may be chosen. The secretary shall call the roll of this committee at the openings of its meetings, keep a correct
432 record of its proceedings, have charge of all its reports, records, books, etc., issue notices and perform all other duties pertaining to his office; shall collect and keep an account of all fines assessed against the members of this committee, and pay same out only by order of the committee on written order of the president.

Order of Business.

The meetings of the committee shall observe the following order of business, unless the rules are suspended and another order substituted for the present meeting:

1. Call of roll of members by secretary and assessment of fines against absentees.
2. Reading of minutes.
3. Reports of standing committees.
4. Unfinished business.
5. New business.
6. Miscellaneous business.

Meetings.

The regular meetings of this committee shall occur on the evening of the second and last Monday in each month, from April 1st to October 1st, at 8 p. m., and at 7.30 p. m. for the balance of the year. The secretary will give notice of meetings to members. Special meetings of this committee may be called by the president at the request of three members, in writing, setting forth the object of such meeting. No other business shall be transacted other than that named in such request.

Penalties.

Any member who shall be absent two consecutive meetings shall be fined fifty cents. Any officer who shall fail to be present at roll-call, or to furnish any book, record, report, key or other property

entrusted to his keeping, shall be fined fifty cents. Any member appointed on any committee, and accepting such appointment, and neglecting to perform such committee duty, shall be fined fifty cents. If parties so fined shall, at the next meeting of the committee, present a valid and sufficient excuse, the fine may be remitted by a two-thirds majority of the members present, otherwise it must be collected.

Arrearages.

Any officer or member who fails to pay his fines within one month from the time of their assessment, shall be expelled from the executive committee and another member elected in his stead.

433 *Publicity.*

No publication or advertisement of the proceedings of this committee, or any of its subcommittees, shall be made without the advice and consent of a majority of its members.

Date of Effect.

These rules shall take effect and be enforced as soon as printed and a copy furnished each member of this committee.

EXHIBIT No. 7.

Nashville, Chattanooga & St. Louis railway; office of general freight agent. G. R. KNOX, general freight agent.

Rates Eastern Cities to Nashville.

NASHVILLE, TENN., 8 *Nov.*, 1890.

Edwin Fitzgerald, Esq., traf. m'g'r, Knoxville, Tenn.

DEAR SIR: Referring to your telegram 6th, and my letter same date, I intended writing you fully on this matter yesterday according to my promise, but Mr. Culp was here all day, and as we did not get through with our matters until 7 o'clock last night, I did not have the opportunity of writing you.

No doubt you are familiar with trunk-line rates to Louisville, Cincinnati, Evansville, etc. They are, as you know, as follows, from New York:

To	1	2	3	4	5	6
Cincinnati	65	57	44	30	26	22
Louisville	75	65	50	35	30	25
Evansville	83	72	55	39	33	28

The totals to Nashville are fixed by adding following arbitraries charged by L. & N. R. R. as its proportion on eastern business Louisville to Nashville:

1	2	3	4	5	6
16	13	10	7	6	6

434 These arbitraries added to the trunk-line rates to Louisville make totals to Nashville, 91, 78, 60, 42, 36, 31, and these are the established rates from New York to Nashville.

I enclose herewith letter from Capt. T. M. Gallagher, G. F. A. U. P. & C. Packet Co., also Nashville & Evansville Packet Co., showing current rates in effect from Cincinnati, Louisville, Henderson and Evansville on general merchandise. In this connection would state I had personal interview with Capt. Ryman, president of above Cos., and he advises me these are outside figures, that on commoner classes of freight lower rates would be made. The rates quoted would be applied to what we term generally 1st and 2nd class freight, this is what river men mean by "general merchandise." On articles included in our 4, 5 and 6 classes they would make rate 10 to 12c. from Louisville and Cincinnati and 8 from Evansville. In this connection would state there are 3 boats per week for about 9 months of the year from Paducah to Nashville, one through boat a week Evansville to Nashville, and one through boat a week Cairo to Nashville, but from Pittsburg, Pa., Cincinnati, Louisville, Evansville, etc., there are almost daily packets handling Nashville business and reshipping at Paducah, so that during 9 months of the year Nashville merchants, if they were using the river, could have their freight handled with little or no delay.

By adding river rates to the trunk-lines rates from Cincinnati, Evansville, you will find that in many cases the present rail rates can be cut.

Take 1st class to Cincinnati	65	
Add boat rate to Nashville	15	80 against 91.
2nd class to Cincinnati	57	
Add boat rate	15	72 against 78.
3rd class to Cincinnati	44	
Add boat rate	15	59 against 60.
4th class to Cincinnati	30	
Add boat rate	10	40 against 42.
5th class to C	26	
Add boat rate	10	36 against 36.
6th class to C	22	
Add boat rate	10	32 against 31.

435 I heard recently that quite a lot of queensware had been imported through some eastern port, which had been forwarded by rail to Pittsburg and put on boat at that point and reshipped at Paducah. Have not been able to get the figures for you on Pittsburg, but it is my impression it would make lowest combination of all, and this is the route we would have to watch more closely on heavy 4th and 5th classes and without having the figures

before me, think the rail rates New York to Pittsburg added to river rates to Nashville would cut the all-rail rates on lower classes, but as you are in a hurry for the information I do not wait to get this for you. If I can be of any further service to you in this matter command me. Hope failure to write you yesterday has not seriously inconvenienced you.

Your- truly, GEO. R. KNOX, *G. F. A.*

Before the Interstate Commerce Commission.

THE BOARD OF TRADE OF CHATTANOOGA *vs.* THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILway Company *et al.* } No. 259.

I, Edward A. Moseley, secretary of the Interstate Commerce Commission, hereby certify that the foregoing is the testimony of witnesses taken before the Interstate Commerce Commission in the above-entitled cause, and also the tariffs and other documents used by the commission as a basis for the report of the commission in said case, which was decided December 13, 1892.

Witness my hand as secretary of said commission this the 8th day of December, 1897.

EDW. A. MOSELEY,
Secretary of the Interstate Commerce Commission.

And afterwards, to wit, on the 22nd day of December, A. D. 1897, a certain stipulation was filed in the clerk's office of said court, which said stipulation is clothed in the words and figures following, to wit:

436 *Stipulation.*

(Endorsed:) Filed Dec. 22, 1897. Henry O. Ewing, Clerk.

In the Circuit Court of the United States for the Eastern District of Tennessee.

THE INTERSTATE COMMERCE COMMISSION *vs.* THE EAST TENNESSEE, VIRGINIA & GEORGIA R'Y Co. *et al.* } In Equity. No. 384.

In this case, it is stipulated and agreed by counsel for the complainant and by counsel for the defendants that in a certain case pending before the Interstate Commerce Commission, known as "In the matter of alleged unlawful charges for the transportation of coal by the Louisville & Nashville Railroad Company," decided November 17, 1892, it was, among other things, found and reported as facts by said commission that the "mines on the Henderson division of the Louisville & Nashville road in Kentucky are grouped along the road some twenty miles, and are from 90 to 110 miles from Nashville to Earlington, the largest shipping point on that division is 105 miles from Nashville."

"From the various mines on the Henderson division to Memphis the distance is from 250 to 270 miles;" that "at present there is a uniform rate from the Western Kentucky mines to Nashville of $1.00 per ton to all persons on the kinds of coal known as 'run of mines, nut and slack,' and this rate does not vary with the season. On 'screened coal' the rate is $1.15 per ton during the period from April 1st to Sept. 1st, while for the remainder of the year, viz., from September 1st to April 1st, it has been fixed at $1.40 per ton."

"As above noted there is an unvarying rate on all coal at all seasons of $1.40 from the same mines to Memphis."

And that the defendant set up in explanation of the relatively low rate from a distance standpoint to Memphis as compared with the rate to Nashville, among other things, competition at Memphis, for coal brought by the rivers from Pittsburg.

It is further stipulated that John B. Adkinson, vice-president and treasurer of the St. Bernard Coal Company, at Earlington, testified as a witness for the defendant in said case as follows:

437 "Q. 6. How was coal brought to the Nashville market before the mines on the Henderson division and the Owensboro and Nashville division of the Louisville & Nashville railroad were opened and furnished transportation facilities to that market?

A. When my company first shipped coal to Nashville in 1871, the market in Nashville was largely supplied with coal that came down the Cumberland river in boats with some Pittsburg coal that came up the river in boats.

Q. 7. Does any considerable quantity of coal now come to Nashville by river and if not, why not?

A. I think no coal comes to Nashville by river at this time. The expense of river transportation, with its attendant losses, drove the river coal from the market, not being able to compete with the railroad coal."

It is further stipulated that the foregoing facts as found by the commission, and the foregoing testimony of said John B. Atkinson in said case may be used as evidence in this case, subject to objections to its competency and relevancy. All formal objections are waived.

This 8th day of December, 1897.

L. A. SHAVER,
Counsel for the Interstate Commerce Commission.
ED. BAXTER,
Counsel for Defendants.

And afterwards, to wit, on the 2nd day of February, A. D. 1898, the opinion of the court was filed in the clerk's office of said court, which said opinion is clothed in the words and figures following, to wit:

Opinion of the Court.

(Endorsed:) Filed Feb. 2, 1898. Crawford T. Johnson, Deputy Clerk.

Circuit Court of the United States for the Eastern District of Tennessee, Southern Division. In Equity.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY *et al.*

This case originated in a complaint lodged with the Inter-
438 state Commerce Commission and filed April 9, 1890, by the Board of Trade of Chattanooga, an association of merchants and manufacturers of that city, charging: First, that the respondents, being engaged in interstate commerce as common carriers and transporting freight and participating in through rates of charges for transportation thereof, from Boston, New York, Philadelphia and Baltimore, designated as eastern seaboard points, to Nashville, Memphis and Chattanooga, in the State of Tennessee, charged through rates to Chattanooga which were unjust and unreasonable in themselves as well as relatively to those to Nashville and Memphis; second, that Nashville, Memphis and Chattanooga were competitors for business in the same territory, and that the through rates charged and participated in by the respondents were much lower to Nashville and Memphis than to Chattanooga "for transporting like property from said seaboard points under the same or substantially the same circumstances and conditions," and that the respondents were thus guilty of unjust discrimination against Chattanooga in giving an undue preference to Nashville and Memphis; and, third, that the respondents under such through rates charged and received a greater compensation for the transportation of a "like kind of property under substantially similar circumstances and conditions" from said eastern seaboard points to Chattanooga than they charged for such transportation over their several lines through Chattanooga to Nashville and Memphis, which last-mentioned cities are 151 and 310 miles, respectively, farther from said eastern seaboard points than is Chattanooga. In terms it is alleged that each of the first four sections of the act to regulate commerce is violated. In support of these allegations the complainant referred to the tariffs on file with the commission, and exhibited tables illustrating the alleged discrimination and the unlawful character of the rates complained of in other respects. The complainant prayed for an order requiring the respondents to cease and desist from said violations of the act to regulate commerce and that they be required to transport property to Chattanooga from eastern seaboard points at such rates as the commission might decide to be just, and also that such order require the respondents to cease trans-

porting property from eastern seaboard points to the cities of Nashville and Memphis for lower rates of freight than they charged for transporting like property to the city of Chattanooga, and there was also a prayer for such other and further relief as the commission might deem necessary to grant relief to the merchants and
439 manufacturers of Chattanooga. Notice was given to the respondents of the filing of this complaint, and most of the respondents appeared and answered, setting up various defenses, the details of which it is unnecessary to go into, it being sufficient for the present purpose to say that the answers put in issue the question whether the rates charged by the companies on through freight from eastern seaboard points to Chattanooga were unjust and unreasonable in themselves, and also the question whether the circumstances and conditions affecting rates at Nashville and Memphis on through freight were so far dissimilar from those existing at Chattanooga as to justify them in making to the three cities the relative rates complained of.

A hearing was had and testimony taken before the commission, and the commission after having fully heard the counsel for the complainant and for many of the various railroad companies announced its decision upon the matter of the said complaint on Dec. 30, 1892. Its conclusion was that the complaint was sustained, upon grounds and reasons hereafter to be referred to, and thereupon the commission ordered and required the respondents to "cease and desist from making, enforcing or receiving any higher rates for such transportation aforesaid to Chattanooga than are or may be at any time accepted by them for like transportation to Nashville." The respondents were notified of the order, but refused to comply with it, whereupon the commission applied to this court, sitting in equity, under the sixteenth section of the act to regulate commerce, praying that the court should by proper process restrain the respondents from continuing the violation and disobedience of the order of the commission. Notice was given to the respondents of the filing of the petition, and many of them appeared and answered. Each side took further proof, and the case was finally submitted to the court on the report and opinion of the commission, and further testimony taken in this court. From this outline of

The History of the Proceedings

it is seen that the matter has been pending for a long time, and it might have happened that some change of circumstances should have taken place between the making of the complaint to the commission and the final submission of the matter to the court. But the additional testimony above referred to has been quite recently taken and seems to indicate that the circumstances remain substantially as they were in the beginning, and the case has
440 been argued and submitted here without any reference to a change in the conditions existing at the present time. It is therefore proper to assume that there is nothing in the *daily* which

has occurred to affect the conclusions which should be reached upon the original complaint.

The case has been fully and elaborately argued, not only at the bar, but in the briefs which have been since submitted. At the hearing it was intimated by the court that in the investigation it must make it would be important to consider whether the commission had in reaching its conclusion refused to consider and give due effect to the difference in the conditions existing respectively at Nashville and Chattanooga affecting the subject of through rates, and among them competition between carriers taking freight to and from the former place, and that this might be considered in determining whether the order which it had made was a lawful one. But upon further reference to section 16 of the commerce act and the decisions of the Supreme Court construing them it appears very clearly that the scope of the power and duty of the court is wider than that thus indicated. By that section it is provided that upon an application by the commission to the circuit court of the United States for a mandate requiring obedience to an order of the commission and notice of such application to the common carrier refusing such obedience the court shall proceed to hear and determine the matter speedily as a court of equity, without the formal pleadings and proceedings customarily employed in such courts, but in such manner as to do justice in the premises, "and to this end such court shall have power if it think fit to direct and prosecute in such mode and by such persons as it may appoint all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition, and on such hearing the findings of fact in the report of said commission shall be *prima facie* evidence of the matters therein stated."

Thereupon the court, if it shall find upon all the matters before it—"the whole body of the evidence"—that the order was a lawful one, and has been disobeyed, is required to issue its mandatory process to compel the observance of the order. Under these provisions it has been held that the court is not restricted in its inquiry to the findings of the commission either as to the law or fact on any of the questions involved, but proceeds to determine all such questions for itself, giving due effect to the findings of fact by the commission as *prima facie* evidence of the facts reported.

441 It will thus be seen that whether the commission should or should not hold as a matter of law that it could accord to the railway carriers the privilege of fixing their rates upon consideration of the differing conditions, such as competition at a given point from other carriers who are likewise amenable to the law, such conclusion would in nowise affect the duty of the court to inquire and determine whether the railway carriers had such privilege or not, and if it should be held that such privilege existed to give effect to it at one of the grounds of its decision.

are only *prima facie* evidence. The court may direct further evidence to be taken, and if it shall finally appear that the facts are otherwise than as reported the court would be governed by the facts as found by itself in forming its judgment.

In the present case the commission put its order upon the ground that the defendants had not the right in view of the fact, that no previous authority had been given by the commission to exercise that privilege, to depart from the rule against charging more for a short than for a long haul, because of a different condition arising from the competition at Nashville by other carriers, part of whom were railroad companies, engaged in through traffic with the East. In this undoubtedly it was in error. The contrary doctrine is now well established. But this error is not material. The legal reason given may be wrong and the order right if upon the facts the latter should be found by the court to be warranted by law. Nor would it affect the duty of the court if the commission had founded its order upon one provision of the act and the facts brought the case within some other. The question therefore is whether the order made was a lawful one in the circumstances as they are made to appear. Now, I think that no one can read these schedules fixing the rates of through traffic from the seaboard to Chattanooga, and to Nashville and Memphis through Chattanooga, without being instantly and strongly impressed that there is something wrong in the principle on which such rates are adjusted, and that the equality which the commerce act was enacted to secure has been utterly disregarded.

It appears from the record that the through rates for freight from New York and Boston to Chattanooga, Nashville, and Memphis, respectively, which are complained of, are as follows:

442 First class:

To Chattanooga	$1 14
To Nashville (151 miles further on)	91
To Memphis (310 miles beyond Chattanooga)	1 00

Second class:

To Chattanooga	98
To Nashville	78
To Memphis	85

Third class:

To Chattanooga	86
To Nashville	60
To Memphis	65

Fourth class:

To Chattanooga	73
To Nashville	42
To Memphis	45

Fifth class:

To Chattanooga	60
To Nashville	36
To Memphis	38

Sixth class:

To Chattanooga	49
To Nashville	31
To Memphis	35

From this it appears that

Comparing the Rates to Chattanooga and Nashville

although the distance to Chattanooga is 151 miles less than to Nashville the charge on first-class freight to the former place is 25 per cent. higher than to the latter; on second class it is 26 per cent higher; on third class it is 43 per cent. higher; on fourth class it is 74 per cent. higher; on fifth class it is 67 per cent. higher, and on sixth class 58 per cent. If the charges are reckoned by mileage, they are about 100 per cent. higher on freight of the three lower classes from New York to Chattanooga than they are to Nashville, and over 67 per cent. higher in the aggregate of rates for all the classes. The result is that the merchants of Chattanooga can ship their goods from the East through to Nashville on the Nashville rate and then ship them back to Chattanooga on local rates
443 at less cost than the charges on an original shipment direct to Chattanooga. The natural result is that the merchants and tradesmen of Nashville can undersell the merchants and tradesmen of Chattanooga in much of the commercial sphere of the latter place, for the Nashville people can ship directly to the points tributary to Chattanooga; and the evidence shows it is the practical result. There is evidence also tending to show that the commercial business of Chattanooga has for years been stagnating. It may be and probably is true that this is in part due to other causes, but considering that no small part of the value of goods shipped over the long distance from the eastern markets to Chattanooga is represented by the freight rates it has borne, it would be manifest without other evidence that the great disparity of rates above shown would go far to crush out the commercial life of a city so heavily burdened.

Comparison of the Rates to Memphis and to Chattanooga

is not so important in the present case, because, as is said by the commission, the greater proximity of Nashville to Chattanooga renders the question between the two last-named places the leading issue. Nevertheless, a reference to the Memphis rate is of value in determining whether the rates to Chattanooga are reasonable rates, it appearing that, though the distance is nearly one-third greater than to Chattanooga from the East, rates are accepted for the Mem-

phis business considerably less than those at Chattanooga. The rate per mile of transportation shows a great disparity and this disparity goes in bulk or nearly so into the profits. It is conceded that

The Competition at Nashville

should be taken into account, though my impression is strong that the competition arising from the rather limited navigability of the Cumberland river is made much more of than the real facts justify. Without much regard to the matter of rates, the carriage of freight by the navigation of such streams as the Cumberland has been almost entirely discontinued in recent years. The delays, the hazards and uncertainties which attend the navigation of such rivers have induced shippers to greatly prefer and to rely upon transportation by rail. It is conceded also that the railroad companies have a just right to insist that their interests and those of the stockholders who have invested their money in the business should also be considered; and the court, in my opinion,
444 would not be faithful to its duty if it should ignore those interests or deny them legal protection. But on the other hand, the just claims of the public, and especially the relative rights of communities and the individuals who constitute them, to the public service undertaken by common carriers must be also taken into account and protected. All these things are to be put in the balance and to each party should be given its right according to the facts as they appear in every case.

The Duty Which the Court Owes to the Public

is surely not less than that which it owes to the carriers. It is admitted by the court that rate-making is the peculiar province of the carriers, and their schedules should not be interfered with by the commission or the courts unless they are against conscience, and by that I mean a conscience instructed and regulated by the law. But it is to be remembered that the railroad business of the country is conducted by able men, animated, as it is right to suppose, with the desire to promote the interests of those whom they serve. Further to promote the efficiency of their work, the officers of the various companies have their associations for the purpose of comparing, studying and adjusting the rates of traffic on their several lines. In the absence of the other party they have everything their own way. It would be expecting something not encountered or expected in other branches of business if we anticipated that they would assume a judicial attitude toward those with whom their business is to be done. And so it is liable to happen that in devising a scheme of rates to compensate for the moderate profits on some part of their traffic which is affected by competition, by heavier rates on other parties and at places where they are not so affected.

Injustice May Be Done in the Disproportion of the Burden Laid upon the Different Communities.

And that is what I think has happened here. There is in this no impeachment of the integrity of any one. It is not a question of intention, however, but is whether the thing done is in contravention of the statute. Conceding that some allowance should be made for the conditions at Nashville, the rigor of the rule of the long and short haul clause of the fourth section moderated to some extent, as it was held might be done in the case of The Commission *vs.* The Alabama Midland Railway Company, 168 U. S., 144, the dis-
445 proportion in the present case is too gross. If for such causes as existed here such unequal charges can be made along the same line of traffic the inevitable result must be that the commerce act will prove of no value and the leading principle of the common law relating to the same general subject will be overthrown.

The railroads cover the country like a web. Only the unproductive and inaccessible places are isolated from their routes. The places where they meet and cross each other and thus come in competition are almost innumerable. They are thickly located in all the commercial parts of the country. If the fact of such competition is allowed to become a dominating factor in fixing the relative charges of transportation to the different places along the lines, those communities where there is no competition must be blighted by the disadvantage with which they are burdened and the favored places grow prosperous in the sacrifice of others. Counsel for the respondents, after noting the wider distance between competitive points in the southern portion of the country, says: "It is not unusual for a southern railroad to run for a hundred miles from one competitive point to another, where the intervening territory is very poor and sparsely settled. The distance between such competitive points is so great that it is practicable for railroads to make a greater charge for a shorter than for a longer haul."

With this as the rule in adjusting rates, it seems certain that the poor places must become poorer and the localities more sparsely settled than ever. At least this would seem to be the very probable tendency. And although I must express an opinion upon a mere question of policy for the carriers with much diffidence, I am very strongly inclined to the belief that their interests would in the long run be better promoted by

Adhering More Closely to the Rules of the Statute 9

than was done in the present case or is likely to be done under the practice which their counsel endeavors to justify. And public policy would also be advanced by the opposite course not only in the encouragement which would thus be given to the distribution of commerce and population, but also in extending that equality of privilege which it is one of the prime objects of legislation to promote.

I am aware that these observations may be thought somewhat general. But the subject must necessarily be treated on broad lines. The commerce act is drawn upon such, and the matters above referred to touch and deeply affect the consideration of cases of this character.

446 The duty devolved upon the court by this act is new and somewhat difficult. In my opinion, it can be most wisely and profitably discharged by estimating the special facts of each case in the light of the general principles which Congress has embodied in the law. No test is given by the act for determining the extent or nature of the dissimilarity of conditions which will make it "substantial," and the question is left to be determined in the first instance by the commission and ultimately by the court upon each case as it arises. There is nothing singular in this. It is another and new instance of questions for which the law furnishes no definite test. For example: Where negligence in the management of a railroad is imputed and legal liability is sought to be charged thereon, the issue is a broad one and its determination must depend upon the application of a general test; and it must happen that judges and juries who are called to decide the question are much less familiar with the details of the business and the requirements of safe management than those who, from many years' experience, have become expert in such matters; and so, where questions of reasonableness are presented, or other like questions of a general character. But there is a necessity that such questions be decided and the courts and juries are delegated to decide them, however much of skill and experience may be involved in the controversy or the solution of it.

As the circumstances vary infinitely and constantly in the course of such business it would seem that Congress must have intended something unusual and peculiar, out of the ordinary course, not ordinarily incident to the business, as that would create a substantial dissimilarity. For otherwise the vast bulk of transportation would not be subject to the rule at all.

The case of The Commission *vs.* The Alabama Midland Railway Company, above cited, is much relied upon by counsel for the railroad companies as giving warrant for the discrimination made in the present case, but the Supreme Court in that case, while reaffirming the doctrine that competition between railway carriers might and frequently ought to be considered in adjusting rates under the long and short haul clause, yet took pains to prevent the inference from its opinion that it should be regarded as a controlling consideration. In that case the discrepancy in rates was slighter than that here shown, and the competition was by water transportation on a great river navigable at all seasons of the year and opening into

447 the Gulf. Both the courts below had concurred in holding that the commission was wrong in thinking the disparity of charges was too great in view of the facts, and the Supreme Court did not find sufficient reason for reversing their decree.

Reasonableness of Present Rates.

It is assumed in argument by counsel in making defense that the rates to Chattanooga are just and reasonable in themselves. This, it is said, is conceded, and upon the premises it is urged, in substances, that the public at Chattanooga has no right to complain if the respondents lower their rates to Nashville. In one sense this is true. But the suggestion is fruitful of other considerations. The question whether the rates are just and reasonable in themselves is in some measure a relative one, that is to say, it may be tested by a comparison of the particular rates with those accepted elsewhere for a similar service, and whether the instances thus employed are or are not such as by their relation to the case in hand are subject to the operation of some other provision of the commerce act, is immaterial.

Besides, I think the question of the justness and reasonableness of rates under the first section is colored by the other provisions of the law and by the general policy of the whole enactment, which is to effect the equality of charges. And at all events it seems to me clear, that the charges accepted for a longer haul may be referred to for the purpose of considering the reasonableness of the charges made for the shorter haul. Such comparisons are applied to every other kind of business, and the fact that there may be competition in such business would not be a controlling consideration, for the presumption would always be that the compensation charged for the service or thing is sufficient to be reasonable. The presumption is not, of course, a conclusive one, but would seem a fair one in the absence of special circumstances.

It is not according to my understanding that it is conceded that the rates to Chattanooga are just and reasonable in themselves.

The Contrary is Alleged

in the complaint made to the commission and the view of the latter seems to have been otherwise, though its order is not put upon that ground. If, as I gather from the testimony, the through rates to Nashville afford a fair profit to the carriers, whether the
448 northern trunk lines or the respondents (and it is reasonable to suppose they would not engage in the business without it), there is substantial ground for contending that the same charge for carrying freight from the East to Chattanooga would afford a reasonable profit and would therefore be a reasonable charge. If the respondents are allowed, as they are by the order of the commission, to make the same charge for carrying to Chattanooga as for carrying to Nashville, the rate, having regard to the difference in distance, would be about 16½ per cent. higher to Chattanooga than that which they charge to Nashville, and the percentage is an increment of the profits. It may be modified slightly by circumstances, none of which are perceived, however, of any importance.

If railway carriers engage in a competitive struggle for business at a place where they meet and underbid each other or other carriers

to a point which is not in itself remunerative, can they turn back on the line, and, taking advantage of the conditions existing at other localities, arising either from the fact that there is no opportunity for competition or from the fact that by concert of the carriers there is none, charge such rates for the shorter haul as shall make good their lack of profits in competitive business, and even up the profits on their whole business to the point they set before themselves as reasonable? To the proposition thus roundly stated, no doubt counsel for the carriers would say that they could not contend for it.

And yet this is the result reached by the not very indirect steps of the argument. And the proposition itself cannot be admitted without "tearing up by the roots" the whole scheme of the commerce act. This is one of the considerations tending to minimize somewhat the privilege arising from competition. In this connection, and as bearing upon the subject now under discussion, it is proper to observe with reference to the considerations resulting from a comparison of the volume of traffic between the seaboard points and Nashville, that it appears to be about equally divided between the northern and southern lines.

In the full and elaborate brief of counsel for the railways several reasons are advanced why it would be difficult to so readjust the rates as not to discriminate against Chattanooga. Attention has been given to all of them. But none of them, in my opinion, rests on any sufficient ground or constitutes any valid justification. One of these reasons is so striking and significant that it deserves special consideration. It is urged that

449 *The Louisville and Nashville Railroad Company is Vitally Interested*

in maintaining the commercial importance of Nashville, and cannot, with due regard to that purpose, so adjust the rates at that place as to enable the respondents to do otherwise than discriminate against Chattanooga. But it appears that that company owns and controls a majority of the stock of the Nashville, Chattanooga and St. Louis Railway Company, the respondent carrier which constitutes that part of the through lines which extends from Chattanooga to Nashville, and fixes the rates for that road. It is, therefore, in a position to ensure to Nashville such concessions as to advance its favoring purpose with reference to that city. It really has no competition there unless it be from the navigation of the Cumberland river.

Referring again to that feature of the case,

Compare the Situation of Chattanooga with that of Nashville

in that regard. The former is only 443 miles by rail from the terminus of water transportation at Charleston and less than that from Savannah, both of which places have uninterrupted communication by steam and sail with New York and the other northeastern seaboard cities. The route is not more circuitous by either place from the East to Chattanooga than by the Cumberland river

to Nashville. The rail portion of the latter route is very much greater than that of the route to Chattanooga when the transportation is partly by rail and partly by water.

Chattanooga is So Much Better Situated in Its Relation to the Eastern Ports,

if it is allowed the legitimate benefit of competition by water transportation, that it is very difficult to find any just reason why the charges to that place should be so out of proportion to those at Nashville.

Chattanooga, Too, Has More Railroads.

They might compete there if they would. They do not think it to their interest to do so. And thus it is that Chattanooga, with a location nearer to the eastern seaboard ports, and having many more railroads than Nashville, is yet denied the benefit of that advantage by reason of the competition at Nashville of one
450 railroad with the navigation of the Cumberland river, an element of trifling importance when compared with the transportation by sea on the route to Chattanooga. The natural advantages greatly favor the latter place. In my opinion the faculty of rate-making has here completely frustrated the law. The scope of the statute is universal, and all the public in every part of the country is entitled to enjoy its benefits. Nor is it a piece of shreds and patches with large rents for great mischiefs to flourish in.

Now for the purpose to increase the commercial prosperity of Nashville is in itself a laudable one, and the court would be far from having any inclination to obstruct it when it is pursued in a lawful way. It is to be hoped and believed, however, that the carriers will be able to find a way to remedy the injustice of the present situation without prejudice to any beneficent purpose toward Nashville. But it is a hard measure of justice to Chattanooga if the upbuilding of the one city is to be done at the charge of the other, by selecting the latter as one to bear the oppressive rates which shall go to make up for the moderate rates charged at the former. Moreover, the reason given shows the estimate which railway carriers themselves have of the effect of their freight rates upon the commercial prosperity of the localities subject to them.

Many topics connected with the subject of schedule-making have been thoroughly and ingeniously discussed. The paths of all these arguments submitted lead to these results:

The Conditions at Nashville Are Dissimilar to Those of Chattanooga.

This fact suppresses the long and short haul provision and justifies discrimination; the extent of the discrimination must be confided to the judgment of the railway officials, whose ability and experience best qualify them for the task. Nowhere in the argument is there any concession or suggestion of any conclusion other than this. All avenues leading elsewhere are carefully closed. If this

be the ground upon which we come, there is nothing for the commission or the court to do but to take notice of the fact that the conditions are dissimilar and abandon all further inquiry. Of course, it is fundamental that no such proposition as this can be admitted, whether we consider the case under the third or (as I think) under the fourth section of the act. Congress, after prescribing certain rules and regulations for such business and to guard against
451 unfair and unjust discrimination in the making of rates, provided a commission and charged it with the supervision of the conduct of railway carriers and with the duty of requiring and enforcing compliance with the rules and regulations of the act.

To secure judicial inquiry and determination of questions between the commission and the carriers arising in the course of business, and process adapted to give effect to such determination, jurisdiction was established in the circuit courts for those purposes. Congress must be presumed to have understood that the courts would not be so adept as the carriers in the intricacies of schedule-making and the adjustment of rates, but it nevertheless committed the ultimate power of determining right and justice in such matters to such measure of sound judgment, good sense and just discrimination as it assumed the courts might possess. This is all that can be invoked, but to this the public as well as the carriers are undoubtedly entitled. I have elsewhere indicated my opinion to be in substance that the question coming before the courts can best be decided upon a field somewhat removed from the labyrinth of the details of tariff schedules and in more unobstructed view of the larger and more controlling facts of the case.

I am aware that the commission on Dec. 31 last, in announcing its opinion in the case of The Savannah Bureau of Freight and Transportation *vs.* The Charleston and Savannah Railway Company, evidently disheartened by the adverse rulings of the Supreme Court in recent cases, more especially those of The Commission *vs.* The Cincinnati, New Orleans and Texas Pacific Railway Company, 167 U. S., 479, and The Commission *vs.* The Alabama Midland Railway Company, 168 U. S., 144, seems to give up section 4 as of no force or effect in any case where the conditions are not "substantially similar." After referring to its former holding that competition between carries subject to the statute did not create such dissimilarity of conditions as would justify discrimination, the commission goes on to say: "Since then, however, the Supreme Court of the United States, by its decision in the case, Interstate Commerce Commission *vs.* The Alabama Midland Railway Company, decided Nov. 8, 1897, 168 U. S., 144, has determined that this view of the law is erroneous, and that railway competition may create such dissimilar circumstances and conditions as exempt the carrier from an observance of the long and short haul provision.

Under this interpretation of the law as applied to the facts found in this case, we are of the opinion that

452 *The Charging of the Higher Rates to the Intermediate Points,*

as set forth, is not obnoxious to the fourth section. The section declares that the carrier shall not make the higher charge to the nearer point under 'substantially similar circumstances and conditions.' If the conditions and circumstances are not substantially similar, then the section does not apply, and the carrier is not bound to regard it in the making of its tariffs." Now, I do not understand that such a conclusion follows from that decision. On the contrary, I suppose that when a violation of the long and short haul provision is charged, competition is one of the elements which enter into the determination, whether the conditions are similar, and if dissimilarity is found, then the further question arises whether the dissimilarity is so great as to justify the discrimination which is complained of. The language of the act ought not to be tied up by such literal construction. If it were, then if it should be found that the dissimilarity of conditions is really in favor of the locality discriminated against, the provision would not apply, a result contrary to the manifest intent. In other words, my opinion is that the restraint of section 4 is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates, and that it is competent under that section to restrain the exaction of the greater charge for the shorter haul, although there may be a substantial dissimilarity of conditions, provided the dissimilarity is not so great as to justify the discrimination made.

But the Long and Short Haul Clause

is only one of the specific provisions employed for the general purpose of the act. The third section underlies the fourth and supplies the principles on which it rests; so that, if the literal construction referred to be put upon the fourth section, the case would still be exposed to the third section, which forbids undue preference to one locality or the subjection of another to any undue disadvantage.

With respect to

The Power of the Court

to deal with the order of the commission, counsel for the respondents refer to the opinion delivered by me in the case of The Commission *vs.* The Detroit, Grand Haven and Milwaukee
453 Railroad Company, 57 Fed., 1005, that having regard to the language of the sixteenth section of the commerce act in prescribing the duty of the court to enforce the order of the commission if it is found to be lawful, and the lack of any words conferring authority to enforce any order other than that, the court was not vested with power to enforce any other order, even though it might be of opinion that some other order would be more appropriate. And this, as is said, was the view of the court of appeals of this circuit in the same case on appeal, 43 U. S. App., 308, 74 Fed., 803. Counsel for the commission contends that the Supreme Court in the

Alabama Midland Railway case expressed a different opinion, and that, therefore, the court is at liberty to mould the order of the commis*mission* to conform to the view which the court might think necessary "to do justice in the case." It seems somewhat doubtful whether the Supreme Court intended to pass upon this question, though possibly the language of the opinion may be susceptible of the construction contended for. Mr. Justice Shiras in delivering the opinion of the court, said, 168 U. S., at page —: "It has been uniformly held by the several circuit courts and the circuit courts of appeal, in such cases, that they are not restricted to the evidence adduced before the commission, nor to a consideration merely of the power of the commission to make the particular order under question, but that additional evidence may be put in by either party, and that the duty of the court is to decide, as a court of equity, upon the entire body of evidence." If the construction of this language contended for by counsel for the commission is correct, it must rest, I should presume, with deference upon the ground that the provision requiring the court to make such determination upon the facts as shall be just should be read in connection with the provision requiring the court, if it finds the order lawful, to issue proper process for its enforcement, and that when so read the meaning is that the court shall enforce the order with such modifications as it shall deem just, though, probably, not an entirely new and different order. But it does not appear to me to be necessary to determine how this is. It is now settled that the commission has no power by its order to fix rates, "either maximum or minimum or absolute." So neither has the court. If, therefore, the court had power to vary the order, it would still be restricted to the making an order enjoining the continuance of an unlawful practice. And this is the character of the order which the commission has made. The case is not one to which the second section is applicable. The inclination of my
454 opinion is that the complaint made to the commission is sustained upon the first section of the act, but as I am entirely satisfied that the practice complained of is in violation of the third and fourth sections, my judgment will proceed upon that ground. Although the reasons given by the commission do not in all respects correspond with the view here taken, my opinion is that upon the facts the order made is a just and reasonable one, and as near to my own sense of the justice of the case as any the court could devise and is at liberty upon this record to make, construing the order, as I do, to require the respondents to desist from charging a higher rate to Chattanooga than is charged, or shall be charged, to Nashville. Some range of discretion is undoubtedly vested in the commission in respect to the mode in which the provisions of the act shall be enforced. And so, upon like reasons, the court has a similar equitable discretion when a case is brought before it and the question is presented whether the order is a right one and fairly due upon the facts of the case. This is the plain inference from the language of the sixteenth section, which confides to the court in broad terms the power of determining what is just in the premises.

It is urged that the enforcement of this order will disturb the

whole scheme of freight rates in a wide section. I am fully conscious of the responsibility I must assume in giving effect to the order, though my expectation is that the companies will find less difficulty in conforming to the order than their counsel seems to fear. But, however, that may be, the duty of the court to right the injustice encountered is plain. Surely it cannot be contended that the rights of one community can be so entangled by a system of rates affecting many others also that justice cannot be done when those rights are denied or withheld.

The prayer of the petition of the commission is granted, and an order for process in accordance therewith will be entered.

SEVERENS, *J.*

And on the same day, to wit, the 2nd day of February, A. D. 1898, an entry was made upon the journal of said court, which said entry is clothed in the words and figures following, to wit:

455 Journal "F," page 361, February 2, 1898.

THE INTERSTATE COMMERCE COMMISSION }
vs.
E. T., V. & GA. R'Y CO. ET AL. }

This cause came on for hearing upon the petition, the answers thereto, proof taken, stipulations of counsel, the proceeding before the Interstate Commerce Commission and the entire record in the cause. It is hereby ordered, adjudged and decreed that the order made by the Interstate Commerce Commission be in all things affirmed and made the order of this court, and injunction will issue, restraining and enjoining the various defendants, each and all of them from further charging or receiving any greater compensation in the aggregate for the transportation of like kind of property from New York, Boston, Philadelphia, Baltimore or other Atlantic seaboard cities to Chattanooga than is or shall be from time to time charged over the same lines in the same direction to Nashville.

It is further ordered, adjudged and decreed that neither party to this cause recover costs against the other.

The foregoing is hereby approved for entry. This Feb'y 2nd, 1898.

H. F. SEVERENS, *U. S. Judge.*

And on the same day, to wit, the 2nd day of February, A. D. 1898, a certain petition for appeal was filed in the clerk's office of said court, which said petition for appeal is clothed in the words and figures following, to wit:

Petition for Appeal.

(Endorsed:) Filed Feb'y 2, 1898. Henry O. Ewing, Clk.

In the Circuit Court of the United States for the Eastern District of Tennessee, at Chattanooga, Tennessee, October Term, 1897.

THE INTERSTATE COMMERCE COMMISSION, Complainant,
vs.
THE EAST TENNESSEE, VIRGINIA & GEORGIA Railway Company; The Norfolk & Western Railroad Company; The Norfolk & Western Railway Company; The Old Dominion Steamship Company; The Western & Atlantic Railroad Company; The Central Railroad and Banking Company of Georgia, and The Louisville & Nashville Railroad Company, Sued by the Name of The Georgia Railroad Company; The Ocean Steamship Company; The Cincinnati, New Orleans & Texas Pacific Railway Company; The Nashville, Chattanooga & St. Louis Railway; The Southern Railway Company; The Central Railroad and Banking Company of Georgia, and The Central of Georgia Railway Company, Defendants.

456 In Equity. No. 384.

The above-named defendants, The East Tennessee, Virginia & Georgia Railway Company; The Norfolk & Western Railroad Company; The Norfolk & Western Railway Company; The Old Dominion Steamship Company; The Western & Atlantic Railroad Company; The Central Railroad and Banking Company of Georgia, and The Louisville & Nashville Railroad Company, sued by the name of The Georgia Railroad Company; The Ocean Steamship Company; The Cincinnati, New Orleans & Texas Pacific Railway Company; The Nashville, Chattanooga & St. Louis Railway; The Southern Railway Company; The Central Railroad and Banking Company of Georgia; and The Central of Georgia Railway Company, conceiving themselves aggrieved by the decree entered in this cause on the 2nd day of February, 1898, do hereby appeal from said decree to the United States circuit court of appeals for the sixth circuit, and they pray that their said appeal may be allowed, and that a transcript of the record and proceedings and paper, upon which said decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the sixth circuit.

ED. BAXTER,
Solicitor for the Above-named Defendants.

Chattanooga, Tennessee, February 2nd, 1898.

457 And on the same day, to wit, the 2nd day of February, A. D. 1898, a certain assignment of errors was filed in the clerk's office of said court, which said assignment of errors is clothed in the words and figures following, to wit:

Assignment of Errors.

(Endorsed:) Filed Febr'y 2, 1898. Henry O. Ewing, Clerk.

In the Circuit Court of the United States for the Eastern District of Tennessee, at Chattanooga, Tennessee, October Term, 1897.

THE INTERSTATE COMMERCE COMMISSION, Complainant, *vs.* THE EAST TENNESSEE, VIRGINIA & GEORGIA Railway Company, The Norfolk & Western Railroad Company, The Norfolk & Western Railway Company, The Old Dominion Steamship Company, The Western & Atlantic Railroad Company, The Central Railroad and Banking Company of Georgia, and The Louisville & Nashville Railroad Company, Sued by the Name of The Georgia Railroad Company; The Ocean Steamship Company, The Cincinnati, New Orleans & Texas Pacific Railway Company, The Nashville, Chattanooga & St. Louis Railway, The Southern Railway Company, The Central Railroad and Banking Company of Georgia, and The Central of Georgia Railway Company, Defendants.	In Equity. No. 384.

On the 2nd day of February, in the year of our Lord eighteen hundred and ninety-eight, in the city of Chattanooga and State of Tennessee, came the defendants, The East Tennessee, Virginia & Georgia Railway Company, The Norfolk & Western Railway Company, The Norfolk & Western Railroad Company, The Old Dominion Steamship Company, The Western & Atlantic Railroad Company, The Central Railroad & Banking Company of Georgia, and The Louisville & Nashville Railroad Company, sued
458 by the name of The Georgia Railroad Company; The Ocean Steamship Company, The Cincinnati, New Orleans & Texas Pacific Railway Company, The Nashville, Chattanooga & St. Louis Railway Company, The Southern Railway Company, The Central Railroad and Banking Company of Georgia, and The Central of Georgia Railway Company, by Ed. Baxter, their solicitor, and say that in the decree, rendered by said circuit court in the above-entitled cause on the 2nd day of February, 1898, and in the record and proceedings in said cause in said court, there is manifest error, in this, to wit:

I.

That said circuit court erred because it failed to adjudge and decree that the matters of equity alleged in the petition, or bill, filed in the above-entitled cause in said court by The Interstate Commerce Commission, complainant, against the above-named defendants are fully denied in the answer, and are not sustained by the proof, and that such petition, or bill, be dismissed.

II.

That said circuit court erred because it in effect adjudged and decreed that the order made by the Interstate Commerce Commission, on the 30th day of December, A. D. 1892, in the case of the Board of Trade of Chattanooga *vs.* The East Tennessee, Virginia & Georgia Railway Company *et al.*, is a lawful order, and should be enforced; whereas said order is unlawful and void, and should not be enforced.

III.

That said circuit court erred in decreeing that the said defendants, The East Tennessee, Virginia & Georgia Railway Company, The Norfolk & Western Railroad Company, The Norfolk & Western Railway Company, The Old Dominion Steamship Company, The Western & Atlantic Railroad Company, The Central Railroad and Banking Company of Georgia, and The Louisville & Nashville Railroad Company, sued by the name of the Georgia Railroad Company; The Ocean Steamship Company, The Cincinnati, New Orleans & Texas Pacific Railway Company, The Nashville, Chattanooga & St. Louis Railway, The Southern Railway Company, The Central Railroad and Banking Company of Georgia, and The Central of Georgia Railway Company, together with the other defendants in said cause, pay the costs of said cause in said circuit court.

459 IV.

That said circuit court erred in decreeing that said defendants, The East Tennessee, Virginia & Georgia Railway Company, The Norfolk & Western Railroad Company; The Norfolk & Western Railway Company; The Old Dominion Steamship Company; The Western & Atlantic Railroad Company; The Central Railroad & Banking Company of Georgia, and The Louisville & Nashville Railroad Company; sued by the name of The Georgia Railroad Company; The Ocean Steamship Company; The Cincinnati, New Orleans & Texas Pacific Railway Company; The Nashville, Chattanooga & St. Louis Railway; The Southern Railway Company; The Central Railroad and Banking Company of Georgia; and The Central of Georgia Railway Company, or such of them as are or may be engaged in the transportation of property from New York and other Atlantic seaboard points to Chattanooga or through Chattanooga to Nashville in the State of Tennessee, be required to cease and desist from charging or receiving any greater compensation in the aggregate for the transportation of like kind of property from

New York, Boston, Philadelphia, Baltimore or other Atlantic seaboard cities for the shorter distance to Chattanooga, than for the longer distance over the same line in the same direction to Nashville.

V.

That said circuit court erred because it, in effect, decided that the rates charged by the above-named defendants for the transportation of property from New York, Boston, Philadelphia, Baltimore and other Atlantic seaboard cities to Chattanooga are unjust and unreasonable.

VI.

That said circuit court erred, because it, in effect, decided that the transportation of property by the above-named defendants from New York, Boston, Philadelphia, Baltimore or other Atlantic seaboard cities to Chattanooga, Tennessee, is a like and contemporaneous service, under substantially similar circumstances and conditions with the transportation of property by the above-named defendants from New York, Boston, Philadelphia, Baltimore or other Atlantic seaboard cities to Nashville, Tennessee.

VII.

That said circuit court erred, because it, in effect, decided
460 that as the above-named defendants make a greater charge in the aggregate for the transportation of property carried by them from New York, Boston, Philadelphia, Baltimore or other Atlantic seaboard cities to Chattanooga, Tennessee, than they make on such property carried by them from New York, Boston, Philadelphia, Baltimore or other Atlantic seaboard cities to Nashville, Tennessee, they thereby give to Nashville, Tennessee, and its traffic, an undue or unreasonable preference or advantage, and subject Chattanooga, Tennessee, and its traffic to an undue or unreasonable prejudice or disadvantage.

VIII.

That said circuit court erred, because it, in effect, decided that the transportation by the above-named defendants of property carried by them from New York, Boston, Philadelphia, Baltimore or other Atlantic seaboard cities to Chattanooga, Tennessee, is transportation conducted under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, as compared with the transportation by the above-named defendants or property carried by them from New York, Boston, Philadelphia, Baltimore or other Atlantic seaboard cities to Nashville, Tennessee.

IX.

That said circuit court erred, because it, in effect, decided that the Interstate Commerce Commission has the power to fix the rates of transportation to be charged by the above-named defendants for

property carried by them from New York, Boston, Philadelphia, Baltimore or other Atlantic seaboard cities to Chattanooga, Tennessee, and to Nashville, Tennessee, respectively.

X.

That said circuit court erred because it, in effect, decided that it, said circuit court, has the power to fix the rates of transportation to be charged by the above-named defendants, for property carried by them from New York, Boston, Philadelphia, Baltimore or other Atlantic seaboard cities to Chattanooga, Tennessee, and to Nashville, Tennessee.

Wherefore the above-named defendants, The East Tennessee, Virginia & Georgia Railway Company; The Norfolk & Western
461 Railroad Company; The Norfolk & Western Railway Company; The Old Dominion Steamship Company; The Western & Atlantic Railroad Company; The Central Railroad and Banking Company of Georgia, and The Louisville & Nashville Railroad Company, sued by the name of The Georgia Railroad Company; The Ocean Steamship Company; The Cincinnati, New Orleans & Texas Pacific Railway Company; The Nashville, Chattanooga & St. Louis Railway; The Southern Railway Company; The Central Railroad and Banking Company of Georgia; and The Central of Georgia Railway Company, pray that said decree of said circuit court of the United States, for the eastern district of Tennessee, at Chattanooga, Tennessee, rendered in the above-entitled cause on the 2nd day of February, 1898, be reversed, and that said circuit court be ordered to enter a decree, dismissing the petition or bill filed in the above-entitled cause, in said court, by The Interstate Commerce Commission, complainant, against the above-named defendants.

ED. BAXTER,
Solicitor for Above-named Defendants and Appellants.

Chattanooga, Tenn., Feb. 2, 1898.

And on the same day, to wit, the 2nd day of Feb'y, A. D. 1898, a certain appeal bond was filed in the clerk's office of said court, which said appeal bond is clothed in the words and figures following, to wit:

Appeal Bond.

(Endorsed:) Filed Feb'y 2, 1898. Henry O. Ewing, Cl'k.

In the Circuit Court of the United States for the Eastern District of Tennessee, at Chattanooga, Tennessee, October Term, 1897.

THE INTERSTATE COMMERCE COMMISSION, Appellee, *vs.* THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILway Company; The Norfolk & Western Railroad Company; The Norfolk & Western Railway Company; The Old Dominion Steamship Company; The Western & Atlantic Railroad Company; The Central Railroad and Banking Company of Georgia, and The Louisville & Nashville Railroad Company, Sued by the name of The Georgia Railroad Company; The Ocean Steamship Company; The Cincinnati, New Orleans & Texas Pacific Railway Company; The Nashville, Chattanooga & St. Louis Railway; The Southern Railway Company; The Central Railroad and Banking Company of Georgia, and The Central of Georgia Railway Company, Appellants.	In Equity. No. 384.

462

Know all men by these presents, that we, The East Tennessee, Virginia & Georgia Railway Company; The Norfolk & Western Railroad Company; The Norfolk & Western Railway Company; The Old Dominion Steamship Company; The Western & Atlantic Railroad Company; The Central Railroad & Banking Company of Georgia, and The Louisville & Nashville Railroad Company, sued by the name of The Georgia Railroad Company; The Ocean Steamship Company; The Cincinnati, New Orleans & Texas Pacific Railway Company; The Nashville, Chattanooga & St. Louis Railway; The Southern Railway Company; The Central Railroad and Banking Company of Georgia; and The Central of Georgia Railway Company, as principals, and Foster V. Brown and J. H. Peebles of the city of Chattanooga, and State of Tennessee, surety-, are held and firmly bound unto the above-named Interstate Commerce Commission in the sum of one thousand dollars, to be paid to the said Interstate Commerce Commission, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our successors, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 2nd day of February, in the year of our Lord, eighteen hundred and ninety-eight.

Whereas, the above-named The East Tennessee, Virginia & Georgia Railway Company; The Norfolk & Western Railroad Company; The Norfolk & Western Railway Company; The Old Dominion Steamship Company; The Western & Atlantic

Railroad Company; The Central Railroad & Banking
463 Company of Georgia; The Louisville and Nashville Railroad Company, sued by the name of The Georgia Railroad Company; The Ocean Steamship Company; The Cincinnati, New Orleans & Texas Pacific Railway Company; The Nashville, Chattanooga & St. Louis Railway; The Southern Railway Company; The Central Railroad and Banking Company of Georgia; and The Central of Georgia Railway Company have prosecuted an appeal to the United States circuit court of appeals, for the sixth circuit, to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the eastern district of Tennessee at Chattanooga on the 2nd day of February, 1898:

Now, therefore, the condition of this obligation is such, that if the above-named The East Tennessee, Virginia & Georgia Railway Company; The Norfolk & Western Railway Company; The Norfolk & Western Railroad Company; The Old Dominion Steamship Company; The Western & Atlantic Railroad Company; The Central Railroad & Banking Company of Georgia, and The Louisville and Nashville Railroad Company, sued by the name of The Georgia Railroad Company; The Ocean Steamship Company; The Cincinnati, New Orleans & Texas Pacific Railway Company; The Nashville, Chattanooga & St. Louis railway; The Southern Railway Company; The Central Railroad & Banking Company of Georgia, and The Central of Georgia Railway Company, shall prosecute said appeal to effect, and answer all damages and costs, if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY, [SEAL.]
By ED. BAXTER, *Its Solicitor.*
THE NORFOLK & WESTERN RAILROAD COMPANY, [SEAL.]
By ED. BAXTER, *Its Solicitor.*
THE NORFOLK & WESTERN RAILWAY COMPANY, [SEAL.]
By ED. BAXTER, *Its Solicitor.*
THE OLD DOMINION STEAMSHIP COMPANY, [SEAL.]
By ED. BAXTER, *Its Solicitor.*
THE WESTERN & ATLANTIC RAILROAD COMPANY, [SEAL.]
By ED. BAXTER, *Its Solicitor.*
THE CENTRAL RAILROAD & BANKING COMPANY OF GEORGIA, [SEAL.]
By ED. BAXTER, *Its Solicitor.*
464 THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, [SEAL.]
By ED. BAXTER, *Its Solicitor.*
THE OCEAN STEAMSHIP COMPANY, [SEAL.]
By ED. BAXTER, *Its Solicitor.*

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY, [SEAL.]
By ED. BAXTER, *Its Solicitor.*
THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, [SEAL.]
By ED. BAXTER, *Its Solicitor.*
THE SOUTHERN RAILWAY COMPANY, [SEAL.]
By ED. BAXTER, *Its Solicitor.*
THE CENTRAL OF GEORGIA RAILWAY COMPANY, [SEAL.]
By ED. BAXTER, *Its Solicitor.*
FOSTER V. BROWN, *Surety.* [SEAL.]
JNO. H. PEEBLES. [SEAL.]

Sealed and delivered and taken and acknowledged before me and approved by me, this 2nd day of February, eighteen hundred and ninety-eight.

H. F. SEVERENS,
U. S. Dist. Judge.

And on the same day, to wit, the 2nd day of February, A. D. 1898, an entry was made upon the journal of said court, which said entry is clothed in the words and figures following, to wit:

Journal "F," page 362, Feb. 2, 1898.

In the Circuit Court of the United States for the Eastern District of Tennessee, at Chattanooga, Tennessee, October Term, 1897.

THE INTERSTATE COMMERCE COMMISSION, Complainant,
vs.
THE EAST TENNESSEE, VIRGINIA & GEORGIA Railway Company, The Norfolk & Western Railroad Company, The Norfolk & Western Railway Company, The Old Dominion Steamship Company, The Western & Atlantic Railroad
465 Company, The Central Railroad and Banking Company of Georgia, and The Louisville & Nashville Railroad Company, Sued by the Name of The Georgia Railroad Company; The Ocean Steamship Company, The Cincinnati, New Orleans & Texas Pacific Railway Company, The Nashville, Chattanooga & St. Louis Railway, The Southern Railway Company, The Central Railroad and Banking Company of Georgia, and The Central of Georgia Railway Company, Defendants.
} In Equity. No. 384.

The above-named defendants, The East Tennessee, Virginia & Georgia Railway Company; The Norfolk & Western Railroad Com-

pany; The Norfolk & Western Railway Company; The Old Dominion Steamship Company; The Western & Atlantic Railroad Company; The Central Railroad & Banking Company of Georgia, and The Louisville & Nashville Railroad Company, sued by the name of The Georgia Railroad Company; The Ocean Steamship Company; The Cincinnati, New Orleans & Texas Pacific Railway Company; The Nashville, Chattanooga & St. Louis Railway; The Southern Railway Company; The Central Railroad and Banking Company of Georgia, and The Central of Georgia Railway Company, pray an appeal from the decree rendered by this court in the above-entitled case, on the 2nd day of February, 1898, to the United States circuit court of appeals for the sixth circuit; and said defendants having filed with the clerk of this court, their petition for appeal, together with an assignment of errors, and an appeal bond, which bond has been duly approved, it is ordered, adjudged and decreed by the court, that said appeal be granted and allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, be sent to the United States circuit court of appeals for the sixth circuit.

The foregoing is hereby approved for entry, Feb. 2nd, 1898.

H. F. SEVERENS,
U. S. Dist. Judge.

466 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

To the Interstates Commerce Commission, Greeting:

You are hereby cited and admonished to be and appear at the court-room of the United States circuit court of appeals, for the sixth circuit, at Cincinnati, Ohio, on the 3rd day of March, eighteen hundred and ninety-eight, pursuant to an appeal allowed and granted by the circuit court of the United States for the eastern district of Tennessee at Chattanooga in the case of The Interstate Commerce Commission, as appellee, and The East Tennessee, Virginia & Georgia Railway Company; The Norfolk & Western Railroad Company; The Norfolk & Western Railway Company; The Old Dominion Steamship Company; The Western & Atlantic Railroad Company; The Central Railroad and Banking Company of Georgia, and The Louisville & Nashville Railroad Company, sued by the name of The Georgia Railroad Company; The Ocean Steamship Company; The Cincinnati, New Orleans & Texas Pacific Railway Company; The Nashville, Chattanooga & St. Louis Railway; The Southern Railway Company; The Central Railroad and Banking Company of Georgia; and The Central of Georgia Railway Company, as appellants, to show cause, if any there be why the decree of said circuit court of the United States for the eastern district of Tennessee, at Chattanooga, rendered on the 2nd day of February, 1898, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, this 2nd day of February, in the year of our Lord eighteen hundred and ninety-eight.

H. F. SEVERENS,
U. S. Dist. Judge.

I acknowledge service of the within citation and waive copy this, the 2d day of February, 1898.

L. A. SHAVER,
Of Counsel for Complainant.

No. 584. Interstate Commerce Commission against E. T., V. & Ga. R'y Co. *et al.* Citation.

467 UNITED STATES OF AMERICA, } ss:
Eastern District of Tennessee, Southern Division, }

I, Henry O. Ewing, clerk of the circuit court of the United States for the district aforesaid, do hereby certify the above and foregoing to be a full, true and correct transcript of the record in the case of The Interstate Commerce Commission *vs.* The East Tennessee, Virginia & Georgia R'y, *et al.*, as the same appears of record and remains on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at office in the city of Chattanooga, Tennessee, this March 1st, 1898.

[SEAL.] HENRY O. EWING, *Clerk.*

468 And afterwards, to wit, on March 9th, 1898, præcipe for appearance was filed in said cause, which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit, October Term, 1897.

EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY CO. }
vs. } No. 595.
INTERSTATE COMMERCE COMMISSION. }

To the clerk of said court:

Please enter my appearance as counsel for the appellant.

ED. BAXTER.

And afterwards, to wit, on March 10th, 1898, a motion to advance the hearing of said cause was filed, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY Company
vs.
THE INTERSTATE COMMERCE COMMISSION. } No. 595.

Now comes Harlan Clevelan-, attorney of the United States for the southern district of Ohio, and moves the court to advance
469 and set this cause for an early hearing and to fix the time within which briefs shall be filed herein, upon the ground that the questions involved herein are of public importance and an early hearing and disposition of said cause is desireable.

HARLAN CLEVELAND,
U. S. Attorney, S. D. O.

And afterwards, to wit, on April 5th, 1898, an order setting cause for hearing was entered, which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY Co.
vs.
INTERSTATE COMMERCE COMMISSION. } No. 595.

This day this cause came on to be heard upon the motion of the appellee to advance the above-entitled cause and fix the time for the oral argument thereof, and thereupon it was, upon agreement of counsel for said respective parties, ordered that this cause be, and the same is hereby, set for hearing at the May session, 1898, of this term, to wit, for Monday, May 16, 1898.

It is further ordered that the appellant have until Wednesday, April 20, 1898, to file their briefs herein, and that the appellee have until Thursday, May 5th, 1898, to file its brief herein.

470 And afterwards, to wit, on June 1st, 1898, an order of continuance was entered, which is in the words and figures following:

United States Circuit Court of Appeals for the Sixth Circuit.

EAST TENNESSEE, VIRGINIA & GEORGIA Railway Co.
vs.
INTERSTATE COMMERCE COMMISSION. } Appeal from the Circuit Court of the United States for the Eastern District of Tennessee. Before Judges Harlan, Taft, and Lurton.

This cause came on this day for hearing, and is argued for appellant by Mr. Ed. Baxter, and by Mr. L. A. Shaver for appellee, and is continued until tomorrow morning at 9.30 o'clock for further argument.

And afterwards, to wit, on June 2nd, 1898, an entry was made upon the journal of said court, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

EAST TENNESSEE, VIRGINIA & *Tennessee* RAILWAY CO.
vs.
INTERSTATE COMMERCE COMMISSION.

This cause came on for further hearing, and was argued further for the appellee by Mr. L. A. Shaver, and on behalf of the appellant by Mr. W. A. Henderson, and is submitted to the court.

471 And afterwards, to wit, on November 13th, 1899, a decree was rendered in said cause, which reads and is as follows:

Decree.

472 United States Circuit Court of Appeals for the Sixth Circuit.

EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY CO.
v.
INTERSTATE COMMERCE COMMISSION. } No. 595.

Appeal from the circuit court of the United States for the eastern district of Tennessee.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Tennessee and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed with costs.

473 And afterwards, to wit, on November 22nd, 1899, a petition for appeal was filed in the words and figures following:

United States Circuit Court of Appeals for the Sixth Circuit, November Term, 1899.

THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY, The Norfolk & Western Railroad Company, The Norfolk & Western Railway Company, The Old Dominion Steamship Company, The Western & Atlantic Railroad, The Central Railroad & Banking Company of Georgia, and The Louisville & Nashville Railroad Company, Sued by the Name of The Georgia Railroad Company; The Ocean Steamship Company, The Cincinnati, New Orleans & Texas Pacific Railway Company, The Nashville, Chattanooga & St. Louis Railway, The Southern Railway Company, The Central Railroad & Banking Company of Georgia, and The Central of Georgia Railway Company, Appellants,
vs.
THE INTERSTATE COMMERCE COMMISSION, Appellee.

The above-named appellants, The East Tennessee, Virginia & Georgia Railway Company, The Norfolk & Western Railroad Com-

pany, The Norfolk & Western Railway Company, The Old Dominion Steamship Company, The Western & Atlantic Railroad Company, The Central Railroad & Banking Company of Georgia, and The Louisville & Nashville Railroad Company, sued by the name of The Georgia Railroad Company; The Ocean Steamship Company, The Cincinnati, New Orleans & Texas Pacific Railway Company, The Nashville, Chattanooga & St. Louis Railway, The Southern Railway Company, The Central Railroad & Banking Company of Georgia, and The Central of Georgia Railway Company, con-
474 ceiving themselves aggrieved by the decree entered in this cause on the 13th day of November, 1899, do hereby appeal from said decree to the Supreme Court of the United States and they pray that their said appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sebt to the Supreme Court of the United States.

ED. BAXTER,
Solicitor for Above-named Appellants.

And afterwards, on the same day, to wit, November 22nd, 1899, assignments of error were filed, clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit, November Term, 1899.

THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY, The Norfolk & Western Railroad Company, The Norfolk & Western Railway Company, The Old Dominion Steamship Company, The Western & Atlantic Railroad Company, The Central Railroad & Banking Company of Georgia, and The Louisville & Nashville Railroad Company, Sued by the Name of The Georgia Railroad Company; The Ocean Steamship Company, The Cincinnati, New Orleans & Texas Pacific Railway Company, The Nashville, Chattanooga & St. Louis Railway, The Southern Railway Company, The Central Railroad & Banking Company of Georgia, and The Central of Georgia Railway Company, Appellants,

vs.

THE INTERSTATE COMMERCE COMMISSION, Appellee.

On the 22nd day of November, in the year of our Lord
475 1899, in the city of Cincinnati and State of Ohio, came the appellants, The East Tennessee, Virginia & Georgia Railway Company, The Norfolk & Western Railroad Company, The Norfolk & Western Railway Company, The Old Dominion Steamship Company, The Western & Atlantic Railroad Company, The Central Railroad & Banking Company of Georgia, The Louisville & Nashville Railroad Company, sued by the name of The Georgia Railroad Company; The Ocean Steamship Company, The Cincinnati, New Orleans & Texas Pacific Railway Company, The Nashville, Chattanooga & St. Louis Railway, The Southern Railway Com-

pany, The Central Railroad & Banking Company of Georgia, and The Central of Georgia Railway Company, by Ed. Baxter, their solicitor, and say that in the decree rendered by the said circuit court of appeals in the above-entitled cause on the 13th day of November, 1899, and in the record and proceedings in said cause in said court there is manifest error, in this, to wit:

I.

That said circuit court of appeals erred in affirming the decree rendered in the above-entitled cause on the 2nd day of February, 1898, by the circuit court of the United States for the eastern district of Tennessee, with costs.

II.

That the said circuit court of appeals erred in not reversing the decree rendered in the above-entitled cause on the 2nd day of February, 1898, by the circuit court of the United States for the eastern district of Tennessee.

III.

That said circuit court of appeals erred because it failed to adjudge and decree that the matters of equity alleged in the petition or bill filed in the above-entitled cause in said circuit court of the United States for the eastern district of Tennessee by the appellee,
476 as complainant, against the above-named appellants, as defendants, are fully denied in the answers and are not sustained by the proof, and that such petition or bill be dismissed with costs.

IV.

That said circuit court of appeals erred because it in effect adjudged and decreed that the order made by the Interstate Commerce Commission on the 30th day of December, 1892, in the case of The Board of Trade of Chattanooga *vs.* The East Tennessee, Virginia & Georgia Railway Company *et al.*, is a lawful order and should be enforced, whereas said order is unlawful and void and should not be enforced.

V.

That said circuit court of appeals erred in decreeing that the above-named appellants pay the costs.

VI.

That said circuit court of appeals erred in decreeing in effect that the above-named appellants or such of them as are or may be engaged in the transportation of property from New York and other Atlantic seaboard points to Chattanooga or through Chattanooga to Nashville, in the State of Tennessee, be required to cease and desist from charging or receiving any greater compensation in the aggregate for the transportation of like kind of property from New York, Boston, Philadelphia, Baltimore, or other Atlantic seaboard cities

for the shorter distance to Chattanooga than for the longer distance over the same line, in the same direction, to Nashville.

VII.

That said circuit court of appeals erred in not deciding that the rates charged by the above-named appellants for the transportation of property from New York, Boston, Philadelphia, Baltimore, and other Atlantic seaboard cities to Chattanooga are just and reasonable.

477

VIII.

That said circuit court of appeals erred in not deciding that the transportation of property by the above-named appellants from New York, Boston, Philadelphia, Baltimore, or other Atlantic seaboard cities to Chattanooga, Tennessee, is not a like and contemporaneous service and is not done under substantially similar circumstances and conditions with the transportation of property by the above-named appellants from New York, Boston, Philadelphia, Baltimore, or other Atlantic seaboard cities to Nashville, Tennessee.

IX.

That said circuit court of appeals erred in not deciding that the above-named appellants in making a greater charge in the aggregate for the transportation of property carried by them from New York, Boston, Philadelphia, Baltimore, or other Atlantic seaboard cities to Chattanooga, Tennessee, than they make on such property carried by them from New York, Boston, Philadelphia, Baltimore, or other Atlantic seaboard cities to Nashville, Tennessee, do not thereby give to Nashville, Tennessee, or its traffice an undue or unreasonable preference or advantage, and do not subject Chattanooga, Tennessee, or its traffic to an undue or unreasonable prejudice or disadvantage.

X.

That said circuit court of appeals erred because it in effect decided that the transportation by the above-named appellants of property carried by them from New York, Boston, Philadelphia, Baltimore, or other Atlantic seaboard cities to Chattanooga, Tennessee, is transportation conducted under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within

478 the longer distance, as compared with the transportation by the above-named appellants of property carried by them from New York, Boston, Philadelphia, Baltimore, or other Atlantic seaboard cities to Nashville, Tennessee.

XI.

That said circuit court of appeals erred because it in effect decided that the appellee, The Interstate Commerce Commission, has the power to fix the rates of transportation to be charged by the

above-named appellants for property carried by them from New York, Boston, Philadelphia, Baltimore, or other Atlantic seaboard cities to Chattanooga, Tennessee, and to Nashville, Tennessee, respectively.

Wherefore the above-named appellants, The East Tennessee, Virginia & Georgia Railway Company, The Norfolk & Western Railroad Company, The Norfolk & Western Railway Company, The Old Dominion Steamship Company, The Western & Atlantic Railroad Company, The Central Railroad & Banking Company of Georgia, and The Louisville & Nashville Railroad Company, sued by the name of The Georgia Railroad Company; The Ocean Steamship Company, The Cincinnati, New Orleans & Texas Pacific Railway Company, The Nashville, Chattanooga & St. Louis Railway, The Southern Railway Company, The Central Railroad & Banking Company of Georgia, and The Central of Georgia Railway Company, pray that said decree of said United States circuit court of *of* appeals for the sixth circuit, rendered in the above-entitled cause on the 13th day of November, 1899, be reversed, and that said court be ordered to enter a decree reversing the said decree rendered on the 2nd day of February, 1898, in the above-entitled cause by the said circuit court of the United States for the eastern district of Tennessee, and ordering said petition or bill filed by said
479 Interstate Commerce Commission in said circuit court to be dismissed with costs.

ED. BAXTER,
Solicitor for the Above-named Appellants.

And on the same day, to wit, on November 22nd, 1899, an appeal bond was filed, which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILway Company, The Norfolk & Western Railroad Company, The Norfolk & Western Railway Company, The Old Dominion Steamship Company, The Western & Atlantic Railroad Company, The Central Railroad & Banking Company of Georgia, and The Louisville & Nashville Railroad Company, Sued by the Name of The Georgia Railroad Company; The Ocean Steamship Company, The Cincinnati, New Orleans & Texas Pacific Railway Company, The Nashville, Chattanooga & St. Louis Railway, The Southern Railway Company, The Central Railroad & Banking Company of Georgia, and The Central of Georgia Railway Company, Appellants,

vs.

THE INTERSTATE COMMERCE COMMISSION, Appellee. } Appeal Bond.

Know all men by these presents that we, The East Tennessee, Virginia & Georgia Railway Company, The Norfolk & Western

Railroad Company, The Norfolk & Western Railway Company, The Old Dominion Steamship Company, The Western & Atlantic Railroad Company, The Central Railroad & Banking Company of Georgia, and The Louisville & Nashville Railroad Company, sued by
480 the name of The Georgia Railroad Company; The Ocean Steamship Company, The Cincinnati, New Orleans & Texas Pacific Railway Company, The Nashville, Chattanooga & St. Louis Railway, The Southern Railway Company, The Central Railroad & Banking Company of Georgia, and The Central of Georgia Railway Company, as principals, and Michael Ryan and Brent Arnold, of the city of Cincinnati, State of Ohio, surety, are held and firmly bound unto the above-named Interstate Commerce Commission in the sum of five thousand dollars, to be paid to the said Interstate Commerce Commission; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 22nd day of November, in the year of our Lord 1899.

Whereas the above-named The East Tennessee, Virginia & Georgia Railway Company, The Norfolk & Western Railroad Company, The Norfolk & Western Railway Company, The Old Dominion Steamship Company, The Western & Atlantic Railroad Company, The Central Railroad & Banking Company of Georgia, and The Louisville & Nashville Railroad Company, sued by the name of The Georgia Railroad Company; The Ocean Steamship Company, The Cincinnati, New Orleans & Texas Pacific Railway Company, The Nashville, Chattanooga & St. Louis Railway, The Southern Railway Company, The Central Railroad & Banking Company of Georgia, and The Central of Georgia Railway Company have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the United States circuit court of appeals for the sixth circuit on the 13th day of November, 1899:

Now, therefore, the condition of this obligation is such that if the above-named The East Tennessee, Virginia & Georgia
481 Railway Company, The Norfolk & Western Railroad Company, The Norfolk & Western Railway Company, The Old Dominion Steamship Company, The Western & Atlantic Railroad Company, The Central Railroad & Banking Company of Georgia, and The Louisville & Nashville Railroad Company, sued by the name of The Georgia Railroad Company; The Ocean Steamship Company, The Cincinnati, New Orleans & Texas Pacific Railway Company, The Nashville, Chattanooga & St. Louis Railway, The Southern Railway Company, The Central Railroad & Banking Company of Georgia, and The Central of Georgia Railway Company shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation

shall be void; otherwise the same shall remain in full force and virtue.

THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY, [SEAL.]
By ED BAXTER, *Its Solicitor.*
THE NORFOLK & WESTERN RAILROAD COMPANY, [SEAL.]
By ED BAXTER, *Its Solicitor.*
THE NORFOLK & WESTERN RAILWAY COMPANY, [SEAL.]
By ED BAXTER, *Its Solicitor.*
THE OLD DOMINION STEAMSHIP COMPANY, [SEAL.]
By ED BAXTER, *Its Solicitor.*
THE WESTERN & ATLANTIC RAILROAD COMPANY, [SEAL.]
By ED BAXTER, *Its Solicitor.*
THE CENTRAL RAILROAD & BANKING COMPANY OF GEORGIA, [SEAL.]
By ED BAXTER, *Its Solicitor.*
482 THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, [SEAL.]
By ——— ———, *Its Solicitor.*
THE GEORGIA RAILROAD COMPANY, [SEAL.]
By ED BAXTER, *Its Solicitor.*
THE OCEAN STEAMSHIP COMPANY, [SEAL.]
By ED BAXTER, *Its Solicitor.*
THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, [SEAL.]
By ED BAXTER, *Its Solicitor.*
THE NASHVILLE, CHATTANOOGA & ST. LOUIS COMPANY, [SEAL.]
By ED BAXTER, *Its Solicitor.*
THE SOUTHERN RAILWAY COMPANY, [SEAL.]
By ED BAXTER, *Its Solicitor.*
THE CENTRAL RAILROAD & BANKING COMPANY OF GEORGIA, [SEAL.]
By ED BAXTER, *Its Solicitor.*
THE CENTRAL OF GEORGIA RAILWAY COMPANY, [SEAL.]
By ED BAXTER, *Its Solicitor.*
MICHAEL RYAN. [SEAL.]
BRENT ARNOLD. [SEAL.]

Sealed and delivered and taken and acknowledged before me and approved by me this 22nd day of November, 1899.

WM. H. TAFT,
U. S. Circuit Judge.

483 And afterwards, on the same day, to wit, November 22nd, 1899, an order granting appeal was entered, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY, The Norfolk & Western Railroad Company, The Norfolk & Western Railway Company, The Old Dominion Steamship Company, The Western & Atlantic Railroad Company, The Central Railroad & Banking Company of Georgia, and The Louisville & Nashville Railroad Company, Sued by the Name of The Georgia Railroad Company; The Ocean Steamship Company, The Cincinnati, New Orleans & Texas Pacific Railway Company, The Nashville, Chattanooga & St. Louis Railway, The Southern Railway Company, and The Central of Georgia Railway Company, Appellants,

vs.

THE INTERSTATE COMMERCE COMMISSION, Appellee.

The above-named appellants, The East Tennessee, Virginia & Georgia Railway Company, The Norfolk & Western Railroad Company, The Norfolk & Western Railway Company, The Old Dominion Steamship Company, The Western & Atlantic Railroad Company, The Central Railroad & Banking Company, and The Louisville & Nashville Railroad Company, sued by the name of The Georgia Railroad Company; The Ocean Steamship Company, The Cincinnati, New Orleans & Texas Pacific Railway Company, The Nashville, Chattanooga & St. Louis Railway, The Southern Railway Company, The Central Railroad & Banking Company of Georgia, and The Central of Georgia Railway Company, pray an appeal from
484 the decree rendered by this court in the above-entitled cause on the 13th day of November, 1899, to the Supreme Court of the United States; and said appellants having filed with the clerk of this court their petition for appeal, together with an assignment of errors and an appeal bond, which bond had been duly approved, it is ordered, adjudged, and decreed by the court that the said appeal be granted and allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, be sent to the Supreme Court of the United States.

WM. H. TAFT.
Circuit Judge.

Nov. 22, 1899.

And on the same day, to wit, November 22nd, 1899, a citation was issued in said cause, which is in the words and figures as follows:

Citation.

485 Citation on appeal.

UNITED STATES OF AMERICA, *ss:*

To the Interstate Commerce Commission, Greeting:

You are hereby cited and admonished to be and appear at the court-room of the Supreme Court of the United States, at Washington, on the 21st day of December, eighteen hundred and ninety-nine, pursuant to an appeal allowed and granted by the United States circuit court of appeals for the sixth circuit, in the case of The East Tennessee, Virginia & Georgia Railway Company, The Norfolk & Western Railroad Company, The Norfolk & Western Railway Company, The Old Dominion Steamship Company, The Western & Atlantic Railroad Company, The Central Railroad & Banking Company of Georgia, and The Louisville & Nashville Railroad Company, sued by the name of The Georgia Railroad Company; The Ocean Steamship Company, The Cincinnati, New Orleans & Texas Pacific Railway Company, The Nashville, Chattanooga & St. Louis Railway, The Southern Railway Company, The Central Railroad & Banking Company of Georgia, and The Central of Georgia Railway Company, as appellants, and The Interstate Commerce Commission, as appellee, to show cause, if any there be, why the decree of said court of appeals rendered November 13th, 1899, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 22nd day of November, in the year of our Lord eighteen hundred and ninety-nine.

WM. H. TAFT,
Circuit Judge.

486 This citation may be served by the marshal of the district where the appellee or its solicitor of record in the above cause may be found.

WM. H. TAFT,
Circuit Judge.

I hereby accept service of the foregoing citation this 24th day of November, 1899.

L. A. SHAVER,
Solicitor for Interstate Commerce Commission, Appellee.

487 And afterwards, to wit, on November 25, 1899, the following printed opinion was filed in this court; which reads as follows:

United States Circuit Court of Appeals, Sixth Circuit.

EAST TENNESSEE, VIRGINIA & GEORGIA Railway Company *et al.*, Appellants, *v.* INTERSTATE COMMERCE COMMISSION, Appellee.	No. 595. Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

Submitted June 2, 1898; decided November 13, 1899.

Before Harlan, circuit justice, and Taft and Lurton, circuit judges.

This is an appeal from a decree of the circuit court for the eastern district of Tennessee (Judge Severens presiding), affirming and enforcing an order of the Interstate Commerce Commission. The cause had its beginning in a complaint of the Board of Trade of Chattanooga, filed with the commission, against a large number of railway and steamship companies engaged in the continuous transportation of merchandise from New York, Boston, Philadelphia and Baltimore to Chattanooga, and to Nashville and Memphis through Chattanooga.

The complaint charged that the defendant companies were injuring the business interests of Chattanooga, which the complainant Board of Trade was incorporated to represent and protect: (1), By charging freight rates from the eastern seaboard points to Chattanooga which were unjust and unreasonably high of themselves, and were thus in violation of the first section of the interstate-commerce act; (2), by charging rates to Chattanooga which were higher than those to Nashville and Memphis and discriminated unduly and unjustly in favor of Nashville and Memphis and against Chattanooga, in violation of the third section of the interstate-
488 commerce act; and, (3), by charging greater compensation for the transportation of like kinds of property, under substantially similar circumstances and conditions, for the shorter distance from the eastern seaboard points to Chattanooga than for the longer distance to Nashville and Memphis, over the same lines, in the same direction, the shorter being included within the longer distance, in violation of the fourth section of the interstate-commerce act. The companies named in the complaint answered, denying that the Chattanooga rates were unreasonable in themselves, denying that they constituted an undue and unjust discrimination against Chattanooga, and denying that the transportation to Nashville and Memphis was under circumstances and conditions similar to those of the Chattanooga traffic, such as to bring the admittedly greater charge to Chattanooga within the fourth section of the interstate-commerce act. The commission heard evidence upon the issues thus raised.

The contention of the defendant companies, foreshadowed in their answers and more fully developed in the evidence and argument, was that competition at Nashville and Memphis with other steamship and railway lines was so great that the conditions of transportation to the more distant cities were entirely different from those

governing the Chattanooga business. Upon this issue, the commission found that the all-water competition by steamer from New York and the other points to New Orleans and thence by steamboat on the Mississippi river to Memphis was actual and continuous and so lowered the possible rates at which the defendant lines could secure any business to that city as to cause the alleged dissimilarity of conditions. The commission therefore held that the complaint as to Memphis rates had not been sustained. As to Nashville the commission found, first, that the alleged water competition from Ohio River points by the Cumberland river to Nashville had no practical effect upon the through rates from New York and the other eastern cities to Nashville; and, second, that the defendant companies transporting merchandise through Chattanooga to Nashville did encounter at Nashville a competition on through eastern business by the East and West trunk lines north of the Ohio river to Cincinnati, and thence by the Louisville & Nashville railroad to Nashville, and that this competition was not subject to the control of the defendant lines. But the commission held that as the East and West trunk lines and the Louisville & Nashville Railroad Company were all subject to the interstate-commerce law, competition maintained by them
489 did not constitute such a dissimilarity of conditions as to take the case out of the fourth section of the act, and that the only remedy of the defendant companies was to apply to the commission for relief, under the proviso of the fourth section, by which the commission upon proper application is empowered to authorize carriers, in special cases, to charge less rates for the longer than for the shorter distance. Accordingly, the commission found that the defendant carriers had violated the fourth section of the act, and made an order requiring the defendant carriers "to cease and desist from charging or receiving any greater compensation in the aggregate for the transportation of like kind of property from New York, Boston, Philadelphia, Baltimore or other Atlantic seaboard cities for the shorter distance to Chattanooga, than for the longer distance, over the same line, in the same direction to Nashville." The order was entered December 30, 1892, but its operation was suspended until February 1, 1893, to enable the defendants to apply to the commission for special authority under the proviso of the fourth section to charge the less rate for the longer distance to Nashville.

The commission did not definitely decide that the rates to Chattanooga were unreasonable in and of themselves, and they did not decide whether the competition at Nashville was of such a character that if application had been made to them they would have made it a special case and authorized the less charge for the longer distance, though there are sentences in the opinion of Commissioner Knapp from which it is to be inferred that the commission were inclined to think that the rates to Chattanooga were unreasonably high, in violation of the first section, and that the competition at Nashville would not justify making the case an exception to the general operation of the fourth section. The carriers failed to

apply to the commission for relief as suggested in the order or to comply with the order. Thereupon, on March 24, 1893, the Interstate Commerce Commission filed the petition in equity against the defaulting carriers upon which the decree appealed from is founded. The petition set out by averments and exhibits the proceedings before it, its findings of fact, its conclusions of law, its order thereon and the refusal of the defendants to obey, and concluded with a prayer for process, hearing and enforcement of the order by injunction.

Because of the disqualification of Judge Clark, who had been of counsel, and also because of the pendency of cases in the
490 supreme court, the decision of which it was thought, by counsel for both parties, would be controlling, the cause did not come on for hearing until December, 1897. Judge Severens decided the case in February, 1898. He held that the commission erred in its view that the defendant carriers were not entitled to rely upon competition of other carriers subject to the interstate-commerce law as a condition rendering the fourth section of the act (the long and short haul clause, so called) inoperative without making special application to the commission for relief from its provisions, and thus did not concur in the sole ground upon which the commission expressly based its order. Proceeding to review the whole body of the evidence, however, he found that the competition at Nashville did not render the conditions and circumstances under which defendant carriers conducted transportation thither, so unlike those existing at Chattanooga as to take the case out of the long and short haul clause, and that, even if the contention of counsel for the carriers that any real dissimilarity, however slight, in conditions of transportation took the case out of the fourth section could be sustained, the discrimination against Chattanooga in the existing rates was so great as to be undue and unjust within the third section of the act. He therefore concluded that the order of the commission was a proper one on other grounds than that upon which it was based, and entered a decree enjoining the carriers in accordance with its terms. He intimated in his opinion that there was sufficient evidence to sustain a finding that the Chattanooga rates were unreasonably high in and of themselves, but he deemed it sufficient merely to enforce the order of the commission as drawn.

The evidence shows that merchandise consigned from New York and other eastern seaboard points (and for the purposes of this case it will hereafter be sufficient to instance the typical case of New York) to Nashville is shipped by a great many different lines, but they are of two classes. One class is made up of East and West trunk lines (so called) lying north of the Ohio river to Cincinnati, and of the Louisville & Nashville railroad to Nashville. The other is made up of a line, either all rail or by water, to a point in southern territory, *i. e.*, in Virginia or further south, near the seaboard, and thence by the southern lines to Chattanooga, and thence by the Nashville, Chattanooga & St. Louis railroad to Nashville. The business of the East and West trunk lines north of the Ohio

river is so great that the rates of freight in force on them are generally much lower (perhaps 33⅓ per cent.) than those in force
491 on the southern lines, which embrace, generally, all lines in States south of the Ohio and east of the Mississippi.

The Louisville & Nashville Railway Company, though a southern line, has put in force from Cincinnati to Nashville, a distance of 295 miles, the trunk-line rates, so that freight rates on merchandise coming to Nashville, by way of Cincinnati, are substantially less than they would be were the usual southern rates of freight charged from Cincinnati to Nashville. Of the southern lines from New York to Nashville, the chief ones are the ocean lines, either to Norfolk, to Charleston, to Savannah and to Brunswick, and thence by rail through Chattanooga to Nashville, or the all-rail lines to Hagerstown, Maryland, and Alexandria, Maryland, and thence by the Southern railway through Chattanooga to Nashville. Eighty per cent. of these all-rail lines are in southern territory, and all the railroads connecting with the southern steamship lines are also in southern territory. If southern rates on Nashville business were charged on that part of the through lines lying in southern territory, the total freight rate to Nashville would be much higher than that charged via the trunk lines to Cincinnati, and via the Louisville & Nashville road to the same point. Therefore the southern lines reduce their charges to such a figure that the total rate becomes the same at Nashville by the southern lines through Chattanooga as by the Louisville & Nashville road from Cincinnati and New York. As a result more than fifty per cent. of the through eastern business to Nashville is carried over the southern lines. The southern lines, however, maintain the southern rates to Chattanooga.

Chattanooga is 330 miles from Cincinnati, with which it is connected by the Cincinnati Southern railway, under lease to the Cincinnati, New Orleans & Texas Pacific Railway Company. The latter company does not charge East and West trunk-line rates on through business from New York to Chattanooga, but fixes its rates according to the southern tariff, though they are less than local rates, and in this way Chattanooga rates, from the East through Cincinnati, are maintained on a southern basis. The rates in the South at Chattanooga and elsewhere are fixed or agreed upon by the southern lines through an association known at different times by different names, at one time as the Southern Railway and Steamship Association, at another as the Southern States Freight Association, and now the Southeastern Freight Association. The association has pursued the policy of grouping towns for the same through rate from the
492 eastern seaboard; Chattanooga is for this purpose grouped with many cities to the South. As to this the commission made the following finding:

As appears from tariffs on file with the commission, the following cities and towns, among others, are grouped with Chattanooga, and take the same rail and water rates on classified traffic, to wit: Dalton, Rome, Atlanta, Americus, Athens, Columbus, Fort Gaines, and Griffin, in the State of Georgia; Huntsville, Decatur, Sheffield, Tus-

cumbia, Florence, Gadsden, Oxford, Talladega, Anniston, Birmingham, Opelika, Montgomery, Selma, and Eufaula, in the State of Alabama; and Enterprise and Meridian, in the State of Mississippi. Of these, Dalton, Rome, Atlanta, Americus, Athens, Columbus, Griffin, Anniston, Gadsden, Oxford, Opelika, and Eufaula have higher all-rail class rates than Chattanooga—their all-rail rates on the six numbered classes being as follows:

1	2	3	4	5	6
122	104	91	77	63	51

The rates to Chattanooga and the above-named common points, both rail and water and all-rail, are established by the Southern Railway and Steamship Association, of which the defendant lines herein are members, and all traffic to those points is governed by the classification of that association.

The grouping is illustrated by the following sketch taken from the brief of counsel for the carriers:

(Here follows diagram marked p. 492.)

493 With this explanation of the way in which the differing rates have come to be fixed, it is proper to make a definite statement of exactly what the differing rates are and their effect. For transportation and rate-fixing, merchandise is classified. There are six classes. The southern classifications differ somewhat from the trunk-line or official classification, but the differences are not great enough to be material in this discussion. The commission found as follows:

The following are the through rates from New York and Boston to Chattanooga, Nashville and Memphis, respectively:

Classes	1	2	3	4	5	6
To Chattanooga	114	98	86	73	60	49
To Memphis, 310 miles farther	100	85	65	45	38	35
To Nashville, 151 miles farther	91	78	60	42	36	31

It thus appears that the rates from New York and Boston are less to Nashville than to Chattanooga, on the six classes respectively, by 23 cents, 20 cents, 26 cents, 31 cents, 24 cents and 18 cents; and less to Memphis than to Chattanooga by 14 cents, 13 cents, 21 cents, 28 cents, 22 cents, and 14 cents. These differences prevail in favor of Nashville and Memphis on all goods transported to those cities from eastern seaboard points through Chattanooga—the distance to Nashville being 151 miles, and to Memphis 310 miles, further than to Chattanooga.

The following comparison shows the difference between the local rate from Cincinnati to Nashville and the amounts added to the trunk-line rate to the former place to make the through rate to the latter from New York:

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	1	2	3	4	5	6
Local rate, Cincinnati to Nashville.. ..	53	48	39	31	25	25
	1	2	3	4	5	6
Additions to trunk-line rate to Cincinnati.	26	21	16	12	10	9

A similar comparison between the local rate from Cincinnati to Chattanooga and the amounts added to the trunk-line rates to Cincinnati to make the through rate from New York to Chattanooga is shown in the following table:

	1	2	3	4	5	6
Local rates Cincinnati to Chattanooga...	76	65	57	47	40	30
	1	2	3	4	5	6
Additions to trunk-line rates to Cincinnati.	49	41	42	43	34	27

494 The proportion of the Nashville through rate charged on a ton of first-class goods from Cincinnati to Nashville via the Louisville & Nashville railroad, a distance of 295 miles, is $5.20, while the proportion of the Chattanooga through rate charged from Cincinnati to Chattanooga via the Cincinnati Southern railway, a distance of 335 miles (only 40 miles further), is $9.80.

The distances by various routes from New York to Nashville and Chattanooga are shown below:

	Miles.
New York to Cincinnati	757
Cincinnati to Nashville	295
	1,052
New York to Cincinnati	757
Cincinnati to Chattanooga	335
	1,092
Via southern lines, all rail:	
New York to Bristol	659
Bristol to Chattanooga	242
	901
Chattanooga to Nashville	152
	1,053
Distances from southern ports to Chattanooga:	
Norfolk to Chattanooga	650
Charleston to Chattanooga	448
Savannah to Chattanooga	435

The city of Chattanooga is in southeastern Tennessee on the river bearing the same name as the State. During the last ten years, especially, its growth has been extremely rapid, and it has become

a manufacturing and commercial point of considerable importance. It competes for the trade of the surrounding country largely in the same territory as Nashville. By reason of the disparity in charges on shipments from the East in favor of Nashville, Chattanooga is placed at serious disadvantage in this competition and its business materially lessened. The tendency of existing rates to these rival towns is to limit the area in which eastern merchandise can be profitably distributed from Chattanooga, and to impede the growth and prosperity of that city, which would naturally result from the development of its wholesale trade.

Under the tariffs now in force goods may be carried from the East through Chattanooga to Nashville and back through Chatta-
495 nooga to points south and east and there sold at lower prices than Chattanooga merchants can sell for; and this appears to have actually occurred in many instances. On a car-load of first-class freight, 40,000 pounds, the charges to Chattanooga, at $1.14 per hundred, amount to $456.00; while to Nashville, at 91 cents, the charges are only $364.00, making a difference of $92.00 in favor of Nashville, the longer haul by 151 miles. On fourth-class freight the advantage in favor of Nashville is $124.00 per car, and on sixth-class, $72.00.

Only two railroads enter Nashville. These are the Louisville & Nashville railroad, from the North and South, and the Nashville, Chattanooga & St. Louis railway, from the East and West.

The railroads entering the city of Chattanooga are:

1. The Nashville, Chattanooga & St. Louis railway, which runs from Chattanooga to Nashville and St. Louis.

2. The Memphis & Charleston road, which runs from Chattanooga to Memphis, where it connects with the Mississippi river and forms a line thence via New Orleans.

3. The Alabama Great Southern road, which runs from Chattanooga to Birmingham, Alabama, and Meridian, Mississippi, connecting with a road entering New Orleans.

4. The Chattanooga Southern railway, from Chattanooga to Gadsden, where it makes several connections.

5. The Chattanooga, Rome & Columbus road, which runs from Chattanooga to Rome, where it connects with various rail lines running through Atlanta to the South Atlantic ports and on to Carrollton, where it connects with the Central Railroad of Georgia system.

6. The Southern railway (south of Chattanooga), which runs from Chattanooga via Rome to Atlanta and there connects with the numerous lines, either all-rail or rail and water, via the South Atlantic ports, and the Southern railway (east of Chattanooga) which runs from Chattanooga via Knoxville to Bristol, and thence forms lines, all-rail, through Hagerstown or Alexandria, or rail and water via Norfolk.

7. The Western and Atlantic railroad, now under lease to the Nashville, Chattanooga & St. Louis Railway Company, which runs from Chattanooga to Atlanta direct.

8. The Cincinnati, New Orleans & Texas Pacific railway, which runs from Chattanooga to Cincinnati.

The seaboard traffic which is carried to Nashville through Chattanooga reaches the latter place by several different routes.
496 The most important of these appears to be the East Tennessee, Virginia & Georgia railway (now the Southern railway), with its eastern connections by rail and water. The water portion of this route is by the vessels of the Old Dominion Steamship Company from New York to Norfolk, where they connect with the Norfolk & Western railroad, which extends to Bristol, Tennessee, the eastern terminus of the East Tennessee, Virginia & Georgia; the rail portion of this route consists of the Pennsylvania system, and possibly other lines, reaching Roanoke, Virginia, on the main line of the Norfolk and Western, by way of the Shenandoah Valley. All traffic over this route passes through Knoxville, Tennessee, the rates to which point are about the same as to Memphis. Another route is by the Clyde Steamship Company to Charleston, connecting at that port with rail lines running through Augusta and Atlanta. A third route is by the Ocean Steamship Company to Savannah, and thence by rail through Macon and Atlanta. A fourth route is by steamer to Brunswick, and thence by Southern railway to Chattanooga. There is no testimony in the case indicating the relative portion of Nashville traffic via Chattanooga which passes by either of these routes, but the commission found that the greater portion of it went by the all-rail route via Alexandria, Virginia.

The Louisville & Nashville Railroad Company has not been a member of the associations of lines fixing southern rates. It owns, however, more than one-half the stock of the Nashville, Chattanooga & St. Louis Railroad Company, which always has been a member of these associations, and it jointly operates the railroad of the Georgia Central and Banking Company, which is also a member of the association. The Georgia Central and Banking Company owns all the stock of the Ocean Steamship Company which has also been a member of the associations. The Nashville, Chattanooga & St. Louis Railroad Company is the only railroad connecting Nashville and Chattanooga. It has under lease the Western and Atlantic railroad, running from Chattanooga to Atlanta. The railroad of the Georgia Central Railroad and Banking Company under the control of the Louisville & Nashville Railroad Company runs from Atlanta to Savannah. And the steamers of the Ocean Steamship Company run from Savannah to New York and Boston. The officers of the Nashville, Chattanooga & St. Louis Railroad Company, it is stipulated, would testify that the company conducts an independent business and competes with the Louisville & Nashville Company.

The Cumberland river, from Paducah, Ky., to Nashville,
497 is open for navigation nine months in the year. The only steamboats running on it are three or four in number, and are capable of carrying not more than three hundred tons of merchandise each. All goods shipped from Cincinnati to Nashville by river, a distance of 617 miles, are transhipped at Paducah, and this

is also true of goods shipped by the same route from Louisville and Evansville. A week is consumed in a round trip from Cincinnati to Nashville by steamboat. It is a two days' trip from Paducah to Nashville. The amount of merchandise carried to Nashville by the Cumberland river from Ohio River points, as compared with that carried by the railroad, is very small, and for twenty years no merchandise shipped from New York by the trunk lines to Nashville has been carried from Ohio River points by the Cumberland river, though rates of freight from those points to Nashville by river are certainly 20 to 25 per cent. less than the rates by rail on through business, and from 40 to 50 per cent. less than the local railway rates for the same distance.

The defendant railroad companies introduced evidence of the traffic managers upon the question of the reasonableness of the existing rates to Nashville and Chattanooga. The uniform evidence was that the Nashville rates were not unreasonably low, and the Chattanooga rates were not unreasonably high. The Nashville rates were said to be remunerative in the sense that they produced a profit over and above the cost of transportation, and the Chattanooga rates were said to be not unreasonably high, because business was done under them and they were not prohibitory; and, further, because on such rates Chattanooga merchants were able to compete with merchants of the cities and towns south of them with which Chattanooga was grouped. No evidence was introduced to show the value of the property necessarily engaged in the business of transportation on any one line, and there was nothing to show that the rates to Nashville did not pay a profit over and above cost of transportation sufficient to meet fixed charges and produce a dividend. Certain of the traffic experts testified that the motive of the Louisville & Nashville Railroad Company in lowering the rates to Nashville was to enable the Nashville merchants to compete with Louisville and Cincinnati merchants in the territory lying between Nashville and the Ohio river, and the same reason is given in the pleadings of some of the defendants and in the briefs of counsel.

498 TAFT, circuit judge, delivered the opinion of the court:

The defendant carriers transport merchandise from New York to Nashville through Chattanooga at rates ranging from 25 to 60 per cent. less than those charged by the same carriers for transporting merchandise from New York to Chattanooga, over the same tracks and in the same trains, although the distance to Chattanooga is 151 miles less than that to Nashville. If the carriage to the two places is under similar circumstances and conditions, then the defendants have violated the fourth section of the interstate-commerce act, and the order of the commission and the judge at the circuit should be sustained. It is contended on behalf of the defendants that the circumstances and conditions of their Nashville business are not similar to those of their Chattanooga business, in that at Nashville they encounter competition which they must meet by lowering their rates in order to secure any business at all, while at Chattanooga

such competition does not exist. This competition is said to be of two kinds:

First. The potential but not actual competition afforded by the situation of Nashville on the Cumberland river, by which it may be reached nine months in the year by steamboat from Evansville and Cincinnati. This gives Nashville water communication with points on the East and West trunk lines whose rates are 33⅓ per cent. less than the southern rates, and thus, it is said, makes it practically a trunk-line point. The evidence does not sustain the claim that in respect to through rates from New York to Nashville via Ohio River points the river competition has any effect whatever. The witnesses for the defendants admit that no through freight from New York to Nashville is ever carried by the Ohio and Cumberland rivers, and this although the rates by river are from 20 to 25 per cent. less than the proportion of the through New York rate to Nashville, collected by the Louisville & Nashville Railroad Company for carriage from Cincinnati to Nashville. But it is said that if the rate is increased to Nashville so as to make it the same as that to Chattanooga, then the river lines will become formidable competitors of the Louisville & Nashville Railroad Company in the through traffic; and freight experts have been produced by the defendants who vaguely express the opinion that to increase the additions made to the trunk-line rates from New York to Cincinnati by the Louisville & Nashville Railroad Company, for its part of the through carriage to Nashville, would induce river competition on this traffic. There has been
499 presented to us an able argument to show the powerful effect of potential water competition upon railway rates in cases where comparatively a small percentage of the freight is actually carried by water. The effect of the Erie canal upon grain rates of freight is cited as a significant illustration. We fully concede much of what is contended on this head, but we find it to have little or no application to the case in hand. It appears by the undisputed evidence that the rates of the Louisville & Nashville railroad from Cincinnati, Louisville and Evansville have practically destroyed not only the New York through business by river, but the local river business from those points to Nashville. The total amount of traffic on the Cumberland river to Nashville is so insignificant, as compared with the local traffic to the same place, that it is not worthy of notice. Now, the local railway rates to Nashville from Ohio River points are about 50 per cent. higher than the through rates on New York shipments between the same points. To make the through New York rate to Nashville the same as that to Chattanooga, the Louisville & Nashville Company will not have to charge as much for its part of the carriage as its local rates. If the local rates have reduced river transportation to a minimum it is clear that any increase on through rates, under which they would still be less than local rates, cannot affect river competition at all. In other words, the margin of possible increase in the through rates, without affecting river competition, includes all the increase in rates required to comply with the order appealed from, even if the carriers elect to bring about the equality enjoined in the order by increasing the Nashville rate

to the Chattanooga rate. We may, therefore, eliminate Cumberland River competition as a factor in reaching our conclusion.

The next question for our consideration is whether the competition of the trunk lines to Cincinnati, and of the Louisville & Nashville railroad to Nashville, makes the conditions of defendants' traffic at that place different from those at Chattanooga. It is settled in the case of Interstate Commerce Comm. *v.* Alabama Midland Railway, 168 U. S., 144, 164, 167, that competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed substantially dissimilar; that the mere fact of competition, however, no matter what its extent or character, does not necessarily relieve the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude consideration of competition in determining dissimilarity of conditions, and that competition may in some cases be such as, having due regard to the interests of the public and the carrier, ought justly to have effect upon the rates.

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It is then the duty of the commission and the reviewing courts in such cases to consider not only the extent, but the character of the competition relied on as a justification for discrimination against the nearer point. It must, therefore, be relevant to ask why such competition is not also present at the nearer point. If the answer to the question is found in the absence at the nearer point of competing railway lines, of water competition and of other circumstances naturally creating competition, then the farther point may be reasonably held to be merely enjoying in its lower rates its normal advantages which may and do justly overcome the mere disadvantage of the greater distance of the haul. But when we find that the nearer point has not only the advantage of less haul, but also more railway lines in actual competition, and that there are no other circumstances of substantial advantage in favor of the more distant point, we have a case which the fourth section of the interstate-commerce law was passed to meet. It is argued that the fact of competitive lower rates at the more distant point speaks for itself, and that no amount of argument can demonstrate a similarity of condition in the face of such a rate. This is only one of many arguments advanced on behalf of appellants, which, reduced to their last analysis, involve as a major premise, that the existence of a rate and movement of business under it are a complete justification of it and foreclose judicial investigation. Such an assumption renders the interstate-commerce law nugatory and useless. There are other causes than normal competition that produce discriminatory rates. The interstate-commerce law, it is conceded, was intended to encourage normal competition. It forbids pooling for the very purpose of allowing competition to have effect. But it is not in accord with its spirit or letter to recognize, as a condition justifying discrimination against one locality, competition at a more distant locality when competition at the nearer point is stifled or reduced, not by normal restrictions, but by agreement between those who otherwise would be competing carriers. The difference

in conditions thus produced is effected by a restraint upon trade and commerce, which is not only violative of the common law, but of the so-called Federal anti-trust act. United States *v.*
501 Trans-Missouri Freight Association, 166 U. S., 290; United States *v.* Joint Traffic Association, 171 U. S., 505; United States *v.* Addyston Pipe & Steel Co., 85 Fed. Rep., 271. Certainly such a difference in conditions ought not to justify a difference in rates before the commission or the court.

Chattanooga is 151 miles nearer than Nashville to New York by the southern and most direct routes. It has at least three through competing southern lines from New York under different managements. These lines reach Nashville over one road from Chattanooga. Chattanooga is connected with Cincinnati, where the stream of traffic of the East and West trunk lines is reached, by a railroad 335 miles in length. Nashville reaches the same city by a railroad 295 miles in length. So far as the record shows, the conditions of railroad transportation between Cincinnati and Nashville are not substantially different from those between Cincinnati and Chattanooga. Both the Louisville & Nashville and the Cincinnati Southern are southern roads. The Louisville & Nashville does not encounter as much unrestricted competition at Nashville as the Cincinnati Southern at Chattanooga, for the only other line entering Nashville is the Nashville & Chattanooga Company, of which the Louisville & Nashville Company owns more than one-half the stock. But it is said that the Louisville & Nashville Company is vitally interested in building up Nashville by enabling her merchants to compete with those of cities on the Ohio river. Why should the interest of this company be any greater in Nashville than that of the Cincinnati Southern railroad in Chattanooga? The difference in the Chattanooga and Nashville rates is to be found in something other than the physical conditions existing at the two cities, for, regarding them alone, there is no reasonable ground for any substantial disparity. The evidence shows that the rates to Chattanooga from Cincinnati and from the eastern seaboard have always been fixed and agreed upon by an association of the southern railway and steamship companies. The Louisville & Nashville Company has not been a member of it, but the Nashville, Chattanooga & St. Louis Company, of which the Louisville & Nashville Company owns a majority of the stock, has always been a member, and so has the Georgia Central Railroad & Banking Company, whose road from Atlanta to Savannah the Louisville & Nashville Company jointly operates. The association has grouped Chattanooga with a large number of towns to the south of it for the same rates, and all the members of the association make their rates to Chattanooga accordingly. The
502 Cincinnati, New Orleans & Texas Pacific railway has been a member of this association, and it is the agreement between it and the other lines at Chattanooga which has prevented the lowering of its New York rate. Without such an agreement it is not possible to see why normal competition would not give Chattanooga substantially the same rates as Nashville. The result

of the agreement is to deny to Chattanooga the natural advantage which direct connection with Cincinnati secures to Nashville and ought to secure to Chattanooga. The agreement is more than a mere tacit understanding resulting from a praiseworthy desire to avoid rate wars and the carriage of goods at less than cost; for the rates to Nashville are admitted to pay a profit over the cost of transportation, and they are from 25 per cent. to 50 per cent. less than the Chattanooga rate for a considerably longer haul with no apparent difference in conditions.

We do not perceive that the fact that the competition at Nashville existed before the defendants began to carry merchandise by the southern route has any material bearing on the issue. It only shows that the cost of transportation on the southern lines was more slowly reduced than on the northern lines; but it does not affect the existing situation.

It is not important to inquire into the motive actuating the Cincinnati, New Orleans & Texas Pacific Railway Company in its acquiescence in the Chattanooga rate agreement, though its greater or less dependence on the great southern railway systems for its north bound business readily suggests itself as a reason for its willingness to hold up its rates and to refuse to Chattanooga what normal competition would give her.

Nor can it be said that the Louisville & Nashville Company, whose fostering care of Nashville is insisted upon in the evidence and briefs for defendants, and is offered as a motive for its low rates to Nashville, is not a party to the plan by which Chattanooga is prevented from enjoying the natural traffic advantages which her railroads and her situation ought to give her. For through its ownership of a majority of the stock of the Nashville, Chattanooga & St. Louis Railway Company, operating a road from Nashville through Chattanooga to Atlanta, its joint operation of the railroad of the Georgia Central Railroad & Banking Company from Atlanta to Savannah in connection with the Ocean Steamship Company, of which the Georgia Central Company owns all the stock, it is very largely interested in traffic from the eastern seaboard to Chattanooga, and through Chattanooga to Nashville, and necessarily
503 exercises an influence in shaping the action of the Southern Traffic Association in fixing rates. By its consent to the discrimination against Chattanooga it only furthers its purpose to favor Nashville, for it enables Nashville merchants to undersell those of Chattanooga to the north and west of that city. We know that it is stipulated in the record that the officers of the Nashville, Chattanooga & St. Louis Railway Company would testify that it competes with the Louisville & Nashville Railroad Company, and that they are under different managements; but such evidence must be weighed in the light of the history of railroads in this country and the motives that ordinarily govern in railroad management. One railroad company acquires the controlling interest in another company to control its general policy; and while it may permit independence in the personnel and the details of management, it needs more than a stipulated statement of this general

nature to induce a belief that the company which elects the directors of the other will permit that other to take a course materially detrimental to the interests of the owning company.

We are pressed with the argument that to reduce the rates to Chattanooga will upset the whole southern schedule of rates and create the greatest confusion; that for a decade Chattanooga has been grouped with towns to the south and west of her, shown in the diagram, and that her rates have been the key to the southern situation. The length of time which an abuse has continued does not justify it. It was because time had not corrected abuses of discrimination that the interstate-commerce act was passed. The group in which Chattanooga is placed, shown by the diagram above, puts her on an equality in respect to eastern rates with towns and cities of much less size and business, and much farther removed from the region of trunk-line rates, and with much fewer natural competitive advantages. If taking Chattanooga out of this group and putting it with Nashville requires a readjustment of rates in the South, this is no ground for refusing to do justice to Chattanooga. The truth is that Chattanooga is too advantageously situated with respect to her railway connections to the north and east to be made the first city of importance to bear the heavier burden of southern rates, when Nashville, her natural competitor, is given northern rates. The line of division between northern and southern rates ought not to be drawn so as to put her to the south of it, if Nashville is to be put to the north of it. And we feel convinced from a close
504 examination of the evidence that but for the restriction of normal competition by the Southern Traffic Association her situation would win for her certainly the same rates as Nashville. It may be that the difficulty of readjusting rates on a new basis is what has delayed justice to Chattanooga. It may well be so formidable as to furnish a motive for maintaining an old abuse.

It has been suggested that traffic managers are much better able, by reason of their knowledge and experience, to fix rates, and to decide what discriminations are justified by the circumstances than courts. This cannot be conceded so far as it relates to the Interstate Commerce Commission, which by reason of the experience of its members in this kind of controversy, and their great opportunity for full information, is, in a sense, an expert tribunal; but it is true of the Federal court. Nevertheless, courts are continually called upon to review the work of experts in all branches of business and science, and the intention of Congress that they should revise the work of railway traffic experts, whether railway managers or commerce commissioners, is too clear to admit of dispute.

We conclude that the defendants are violating the fourth section of the interstate-commerce act in charging a higher rate from New York and other eastern cities to Chattanooga than to Nashville. The order that enjoined them from doing so is therefore right. The decree of the circuit court affirming the order of the commission is affirmed with costs.

505 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record and the original citation in the case of East Tennessee, Virginia & Georgia R'y Co. *et al.* vs. Interstate Commerce Commission, No. 595, October term, 1899, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this seventh day of December, 1899.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No., 17,595. U. S. C. C. of appeals, sixth circuit. Term No., 481. The East Tennessee, Virginia & Georgia Railway Company, The Norfolk & Western Railroad Company, *et al.*, appellants, *vs.* The Interstate Commerce Commission. Filed January 2nd, 1900.

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20305

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY ET AL., APPELLANTS,

v.

THE INTERSTATE COMMERCE COMMISSION, APPELLEE.

MOTION TO ADVANCE.

The Solicitor-General, at the request and on behalf of the appellee in the above-entitled cause, respectfully moves the court to advance the same on the docket for hearing during the present term, on the following grounds:

1. The case is a proceeding in equity under section 16 of the act to regulate commerce, for the enforcement of an order of the appellee, the Interstate Commerce Commission, against the appellants, and that section of the law provides that the courts "shall proceed to hear and determine" such cases "*speedily* as courts of equity."

2. The appellee is a bureau or department of the Government, and the case presents questions of general public interest and involves matter affecting large communities and sections of the country in the States of Tennessee, Georgia, and Alabama.

3. Both the courts below, to wit, the circuit court of the United States for the eastern district of Tennessee and the circuit court of appeals for the sixth circuit, rendered decrees in favor of appellee for the enforcement of its order, which have been superseded pending the appeals, and if said decrees be just and free from error, a speedy determination by this court of said matter will subserve the public interests involved.

4. Counsel for the appellants consents to the granting of this motion, and it is suggested by counsel on both sides that, if agreeable to the court, the case shall be advanced for hearing to a day about the last of February, 1900.

JOHN K. RICHARDS,
Solicitor-General.

I hereby accept service of this motion, and consent that the same be granted and that it may be submitted to the court on Monday, January 8, 1900.

ED. BAXTER,
Solicitor for the Appellants.

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Office Supreme Court U. S.
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FEB 24 1900
JAMES H. McKENNEY,
Clerk.

No. 481 Ex. 175

Y. of Baxter for Appts.

Filed Feb. 24, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

NO. 481.

THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY, THE NORFOLK & WESTERN RAILROAD COMPANY, ET AL., Appellants,

vs.

THE INTERSTATE COMMERCE COMMISSION, Appellee.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

ARGUMENT OF

ED. BAXTER, of Counsel for Appellants.

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I. C. C. vs. B. & O. R. R. Co., 145 U. S., pp. 275, 276, 277, 281, 282, 283 ..... pp. 70, 100, 114, 117, 146, 156

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

NO. 481.

THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY, THE NORFOLK & WESTERN RAILROAD COMPANY, ET AL., Appellants,

vs.

THE INTERSTATE COMMERCE COMMISSION, Appellee.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

Argument of ED. BAXTER, of Counsel for Appellants.

STATEMENT OF THE CASE.

I.

The Decree Appealed From.

The appellants The East Tennessee, Virginia & Georgia Railway Company; The Norfolk & Western Railroad Company; the Norfolk & Western Railway Company; the Old Dominion Steamship Company; the Western & Atlantic Railroad Company; the Central Railroad & Banking Company of Georgia, and the Louisville & Nashville Railroad Company, sued by the name of the Georgia Railroad Company; the Ocean Steamship Company; the Cincinnati, New Orleans & Texas Pacific Railway Company; the Nashville, Chattanooga & St. Louis Railway; the Southern Railway Company; the Central Railroad & Banking Company of Georgia; and the Central of Georgia Railway Company appeal from a decree rendered by the United States Circuit Court of Appeals for the Sixth Circuit on the 13th day of November,

1899 (Trans. p. 393), which affirmed a decree rendered by the Circuit Court of the United States for the Eastern District of Tennessee at Chattanooga on the 2d day of February, 1898 (Trans. p. 381), which latter decree affirmed a certain order made by the Interstate Commerce Commission, which ordered the appellants, and certain other common carriers, to cease and desist from "charging or receiving any greater compensation in the aggregate for the transportation of like kind of property from New York, Boston, Philadelphia, Baltimore or other North Atlantic seaboard cities for the shorter distance to Chattanooga than for the longer distance over the same line in the same direction to Nashville."

Trans. p. 57.

The Assignment of Errors filed by the appellants will be found in

Trans. p. 394, et seq.

The opinion of the Commission will be found in

Trans. p. 37.

The opinion of the Circuit Court will be found in

Trans. p. 367.

The opinion of the Court of Appeals will be found in

Trans. p. 402.

II.

Proceedings Before the Commission. The Petition.

The Board of Trade of Chattanooga, Tenn., filed a petition before the Interstate Commerce Commission, against the appellants, and certain other railroad and steamship companies, in which it was averred, among other things:

First: That the defendants to said petition (the appellants) are common carriers engaged in the transportation of passengers and property by railroad and water from seaboard points in the States of Massachusetts, New York, Pennsylvania and Maryland, to points in the State of Tennessee.

Trans. p. 9.

Second: That said appellants separately and jointly have

been and are now transporting property, and participating in through rates of freight charges for transporting the same, from Boston, New York, Philadelphia, and Baltimore, to Nashville, Memphis and Chattanooga; which three last named cities compete for business in the same territory.

Trans. p. 9.

Third: That said appellants transport property from Boston, New York, Philadelphia, and Baltimore, through Chattanooga, to Nashville and Memphis; that said two last named cities are respectively 151 and 310 miles farther distant than Chattanooga from Boston, New York, Philadelphia, and Baltimore; and that said appellants charge lower rates to Nashville and Memphis than they charge to Chattanooga.

Trans. p. 10.

Fourth: That the rates charged by said appellants to Chattanooga are too high in themselves, and, therefore, violate the first section of the Act to Regulate Commerce.

Trans. p. 10.

Fifth: That said rates are too high in comparison with the rates charged by said appellants to Nashville and Memphis; that they unjustly discriminate against the merchants of Chattanooga in favor of the merchants of Nashville and Memphis, and, therefore, violate the second section of said Act.

Trans. p. 10.

Sixth: That the lower rates charged by said appellants to Nashville and Memphis constitute an undue preference of the merchants of those cities over the merchants of Chattanooga, and, therefore, violate the third section of said Act.

Trans. p. 10.

Seventh: That transportation from Boston, New York, Philadelphia, and Baltimore, to Chattanooga, is conducted under substantially the same circumstances and conditions as transportation to Nashville and Memphis, and, therefore, the charging of higher rates for the shorter distance to Chattanooga than for

the longer distance to Nashville and Memphis violates the fourth section of said Act.

Trans. pp. 9, 10.

III.

Proceedings Before the Commission. Answers of the Defendants.

All of the defendants to said petition, except three, filed answers thereto. The appellants, the East Tennessee, Virginia & Georgia Railway Co. and the Norfolk & Western Railroad Co. filed a joint and several answer.

First: They admitted that they are common carriers engaged in the transportation of passengers and property by railroad from Boston, New York, Philadelphia and Baltimore, to Chattanooga, Nashville, and Memphis.

Trans. p. 14.

Second: They admitted that they are participating in through rates of freight charges from Boston, New York, Philadelphia, and Baltimore, to Chattanooga, Nashville, and Memphis.

Trans. p. 14.

Third: They admitted that they are engaged in the transportation of property from Boston, New York, Philadelphia, and Baltimore, through Chattanooga, to Nashville and Memphis; they admitted that said two last named cities are respectively 151 and 310 miles farther distant than Chattanooga, from Boston, New York, Philadelphia and Baltimore; and that said defendants charge lower rates to Nashville and Memphis than they charge to Chattanooga.

Trans. pp. 14, 15.

Fourth: They denied that the rates charged by them to Chattanooga are too high in themselves; and they denied that said rates violate the first section of the Act to Regulate Commerce.

Trans. p. 15.

Fifth: They denied that said rates are too high in comparison with the rates charged by them to Nashville and Memphis; they denied that said rates unjustly discriminate against the merchants of Chattanooga, in favor of the merchants of Nashville and Memphis; and they denied that said rates violate the second section of said Act.

Trans. p. 15.

Sixth: They denied that the lower rates charged by them to Nashville and Memphis constitute an undue preference of the merchants of those cities over the merchants of Chattanooga; and they denied that said rates violate the third section of said Act.

Trans. p. 15.

Seventh: They denied that transportation from Boston, New York, Philadelphia, and Baltimore, to Chattanooga, is conducted under substantially the same circumstances and conditions as transportation to Nashville and Memphis; and they denied that the charging of higher rates for the shorter distance to Chattanooga, than for the longer distance to Nashville, and Memphis, violates the fourth section of said Act.

Trans. pp. 14, 15.

IV.

Proceedings Before the Commission. Its Findings of Fact. The Appellants' Lines from North Atlantic Seaboard to Chattanooga, Nashville and Memphis.

Testimony was taken before the Commission; and it filed its report and opinion, in which it finds as facts, among other things, the following, viz.:

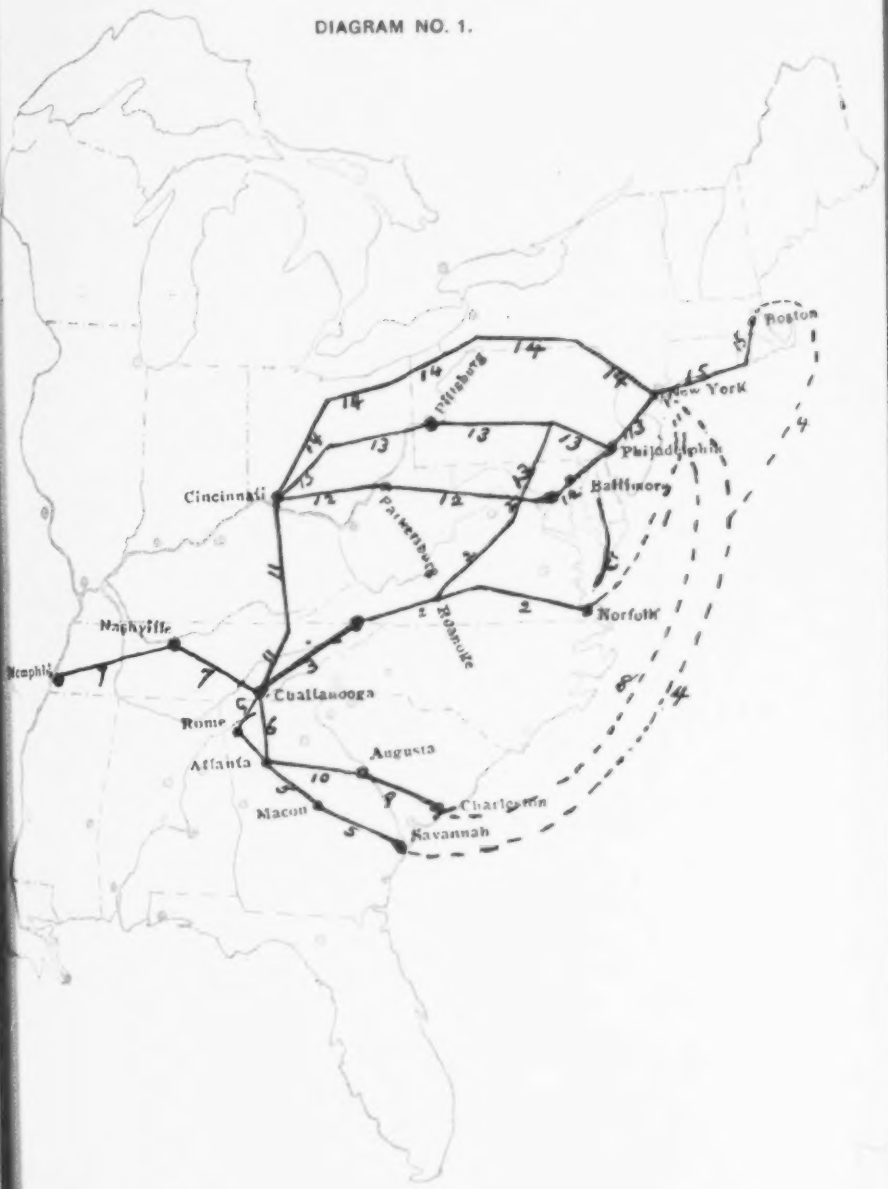
First: The Commission finds and reports that the following named defendants are severally common carriers, engaged in interstate commerce, as parts of through lines, and under joint tariffs of rates, to Chattanooga, Nashville, and Memphis, Tennessee. The lines of said defendants are shown on Diagram No. 1; and they are numbered on said diagram as in the page preceeding said diagram.

INDEX TO DIAGRAM NO. 1.

No. 1. Old Dominion Steamship Line.
No. 2. Norfolk & Western R. R.
No. 3. East Tennessee, Virginia & Georgia R'y.
No. 4. Ocean Steamship Line.
No. 5. Central Railroad & Banking Co. of Georgia.
No. 6. Western & Atlantic R. R.
No. 7. Nashville, Chattanooga & St. Louis R'y.
No. 8. Clyde Steamship Line.
No. 9. South Carolina R'y.
No. 10. Georgia R. R.
No. 11. Cincinnati, New Orleans & Texas Pacific R'y.
No. 12. Baltimore & Ohio R. R.
No. 13. Pennsylvania Co.; and Pennsylvania R. R. Co.
No. 14. New York, Lake Erie & Western R. R.
No. 15. New York & New England R. R.

Trans. p 41.

DIAGRAM NO. 1.


Boston
New York
Pittsburg
Philadelphia
Baltimore
Cincinnati
Parkersburg
Norfolk
Roanoke
Nashville
Memphis
Chattanooga
Rome
Atlanta
Augusta
Macon
Charleston
Savannah

V.

The Commission's Finding as to the Transportation Lines from the North Atlantic Seaboard to Nashville.

The Commission finds and reports that "there are a number of routes by which traffic from the Eastern Seaboard is carried to Nashville. The-e may be separated into two classes, or groups; one consisting of the lines passing through Chattanooga (which lines are shown in Diagram No. 1), the other of the lines passing through Cincinnati, Louisville, Evansville, and possibly other points north of Chattanooga."

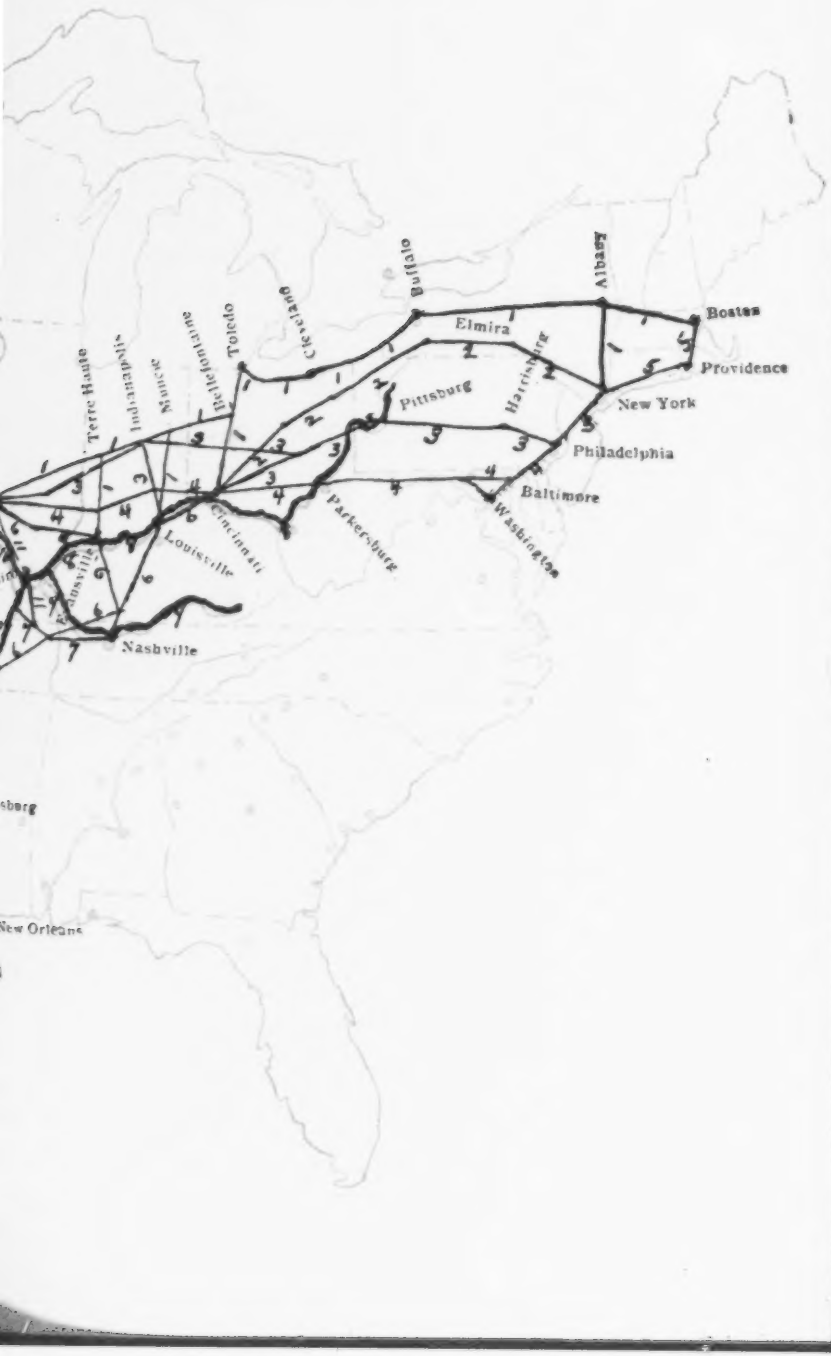
Trans. p. 42.

The lines by which traffic from the Eastern Seaboard can be carried to Nashville through Cincinnati, Louisville, Evansville, and other points north of Chattanooga, are shown on Diagram No. 2; and they are numbered on said diagram, as in the page preceeding said diagram.

INDEX TO DIAGRAM NO 2.

No. 1. New York Central R. R. and connections.
No. 2. Erie R. R. and connections.
No. 3. Pennsylvania R. R. and connections.
No. 4. Baltimore & Ohio R. R. and connections.
No. 5. New York & New England R. R.
No. 6. Louisville & Nashville R. R.
No. 7. Nashville, Chattanooga & St. L. R'y.
No. 8. Ohio River.
No. 9. Cumberland River.
No. 10. Mississippi River.
No. 11. Mobile & Ohio R. R.

DIAGRAM NO. 2.


Buffalo
Albany
Boston
Elmira
Providence
Cleveland
Toledo
Terre Haute
Indianapolis
Muncie
Pittsburg
Harrisburg
New York
Philadelphia
Baltimore
Washington
Cincinnati
Parkersburg
Louisville
Nashville
New Orleans

VI.

The Commission's Finding as to How the Nashville Traffic is Divided Between the Different Routes.

The Commission finds and reports that it was not very definitely shown how the aggregate through business (from the Eastern Seaboard) to Nashville is divided between said different groups (or lines), but that "it is fairly inferable from the evidence that the lines *through Chattanooga* carry fifty to sixty per cent. of the total tonnage."

Trans. p. 42.

The Commission also finds and reports that "the seaboard traffic which is carried to Nashville *through Chattanooga* reaches the latter place by several different routes. The most important of these appears to be the East Tennessee, Virginia & Georgia Railway, with its eastern connections by rail and water. The water portion of this route is by the vessels of the Old Dominion Steamship Company from New York to Norfolk, where they connect with the Norfolk & Western Railroad, which extends to Bristol, Tennessee, the eastern terminus of the East Tennessee, Virginia & Georgia; the rail portion of this route consists of the Pennsylvania system and possibly other lines reaching Roanoke, Va., on the main line of the Norfolk & Western by way of the Shenandoah Valley." . . . . "Another route is by the Clyde Steamship Company to Charleston, connecting at that port with rail lines running through Augusta and Atlanta; and a third route is by the Ocean Steamship Company to Savannah, and thence by rail through Macon and Atlanta. There is no testimony in the case indicating the relative portion of Nashville traffic *via Chattanooga* which passes by either of these routes, but our understanding is that the greater portion of it goes by the one first above described," i. e., the route via the E. T., V. & Ga. Ry. and its connections.

Trans. pp. 43, 44.

All three of said routes are shown on Diagram No. 1.

VII.

THE COMMISSION'S FINDING AS TO THE TRANSPORTATION LINES FROM THE NORTH ATLANTIC SEABOARD TO MEMPHIS.

The Commission finds and reports that "the traffic from Atlantic seaboard points to Memphis is also divided between several independent routes. One of these general routes is by the all-rail lines through Cincinnati, Louisville, Evansville," etc.

. . . . "A second route is the one through Chattanooga, formed by the East Tennessee, Virginia & Georgia Railway, with its eastern connections, and requires no further description. Two other routes are those already mentioned by way of Charleston and Savannah respectively. The Memphis traffic by the last named routes does not necessarily go through Chattanooga, but may take a shorter course from Atlanta by way of Birmingham. In addition to these is the ocean route to New Orleans, and thence to Memphis by rail, or by river."

Trans. p. 44.

The lines by which traffic from Atlantic Seaboard points can be carried to Memphis are shown on Diagram No. 3; and they are numbered on said diagram as in the page following said diagram.

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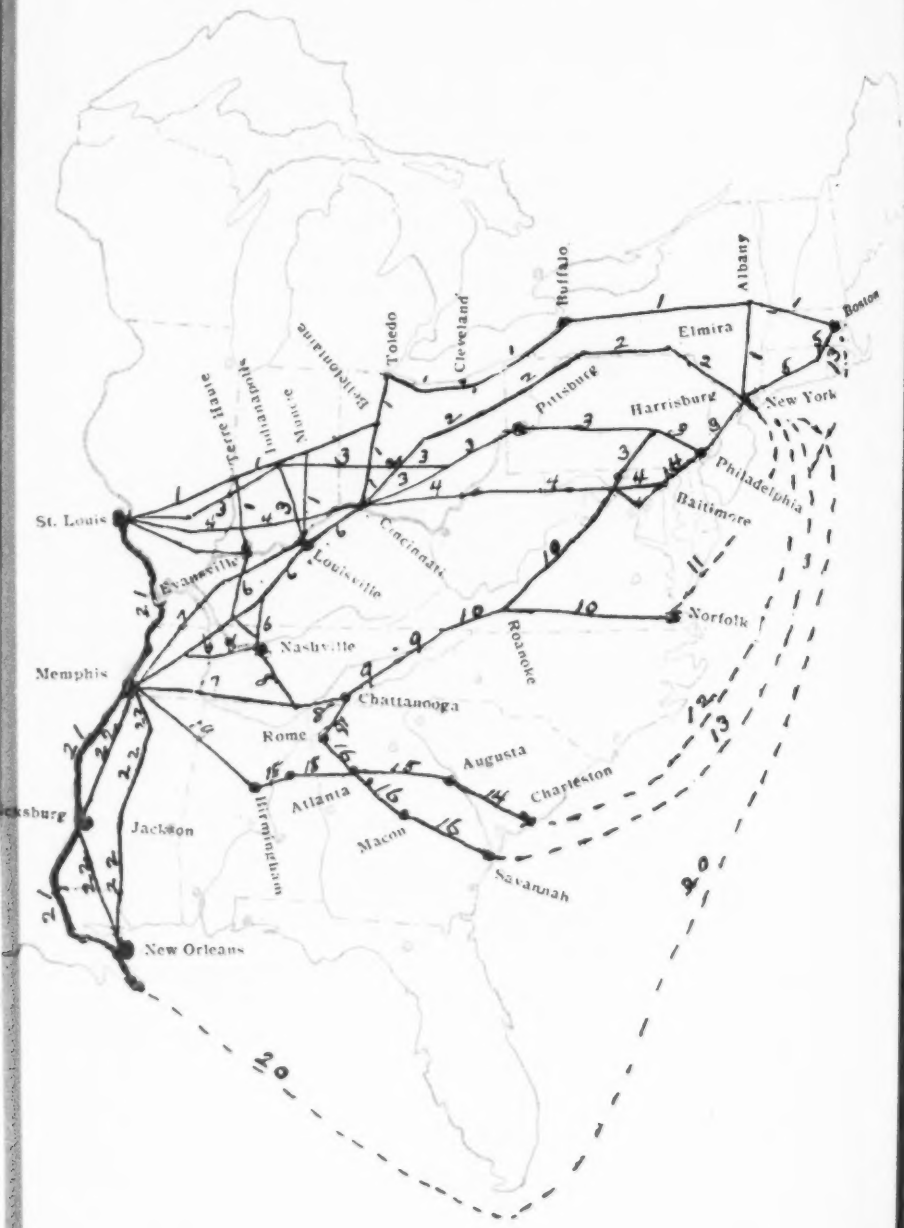
DIAGRAM NO. 3.



INDEX TO DIAGRAM NO 3.

No. 1. New York Central R. R. and connections.
No. 2. Erie R. R. and connections.
No. 3. Pennsylvania R. R. and connections.
No. 4. Baltimore & Ohio R. R. and connections.
No. 5. New York & New England R. R.
No. 6. Louisville & Nashville R. R.
No. 7. Chesapeake, Ohio & Southwestern R. R.
No. 8. Nashville, Chattanooga & St. Louis R'y.
No. 9. East Tennessee, Virginia & Georgia R'y.
No. 10 Norfolk & Western R. R.
No. 11. Old Dominion Steamship Line.
No. 12. Clyde Steamship Line.
No. 13. Ocean Steamship Line.
No. 14. South Carolina R'y.
No. 15. Georgia R. R.
No. 16. Central Railroad & Banking Co. of Georgia.
No. 17. Memphis & Charleston R. R.
No. 18. Georgia Pacific R. R.
No. 19. Kansas City, Memphis & Birmingham R. R.
No. 20. Ocean Route, New York to New Orleans.
No. 21. Mississippi River.
No. 22. Illinois Central R. R.

VIII.

The Commission's Finding as to the Transportation Lines from the North Atlantic Seaboard to Chattanooga.

The Commission finds and reports that there are "several routes by which shipments *terminating at Chattanooga* reach their destination. A portion of this traffic goes by the trunk lines to Cincinnati, and thence by the Cincinnati Southern Railroad, now controlled by the Cincinnati, New Orleans & Texas Pacific Company." (See Diagram No. 1) . . . . . "Another portion of the Chattanooga traffic goes by the route formed by the lines of the East Tennessee, Virginia & Georgia Railway, and its eastern connections by rail and water hereinbefore mentioned. The other routes by which Chattanooga shipments reach their destination, are those reached by water and rail through Charleston and Savannah, respectively, which have already been sufficiently described." (See diagram No. 1.)

Trans. pp. 44, 45.

The Commission reports that there is no proof showing the relative amount of Chattanooga shipments by either of the routes mentioned; but it says: "Our impression, however, is that the larger portion of this traffic goes by the Cincinnati route and by the route of the East Tennessee, Virginia & Georgia Railway and its connecting lines."

"There may be other routes, or lines, by which traffic from the Atlantic Seaboard reaches Nashville, Memphis, or Chattanooga, but the foregoing are those by which the great bulk of eastern shipments is carried to these several points, and the only ones which need to be considered in this investigation. *The rates to each of these towns are the same by whatever route the transportation is effected, except the rate to Memphis, via New Orleans.*"

Trans. p. 45.

IX.

The Commission's Finding as to How Rates Are Made From the North Atlantic Seaboard to Nashville.

The Commission finds and reports with reference to the rates from the North Atlantic Seaboard to Nashville that:

"*The Nashville rate is independent of the lines operating through Chattanooga, and those lines have no voice in determining its amount. That rate is made by the all-rail carriers via Cincinnati, and their action is uncontrolled by the appellant Lines.* The competition which the latter meet at Nashville is distinctly the competition of the Trunk Lines and the Louisville & Nashville System, whose northern termini are at points on the Ohio River which receive Trunk Line rates on eastern shipments."

Trans., p. 49.

The Commission also finds and reports that:

"The rates from New York and Boston to Cincinnati are:

Classes	1	2	3	4	5	6
Rates	65	57	44	30	26	22

"From the same points to Louisville the rates are:

Classes	1	2	3	4	5	6
Rates	75	65	50	35	30	25

"And to Evansville:

Classes	1	2	3	4	5	6
Rates	83	72	55	39	33	28

"*The above charges are imposed for carrying the traffic to these towns respectively, whether the transportation terminates there or is continued to Nashville; in other words, the lines east of these points (i. e., Cincinnati, Louisville and Evansville) receive the same compensation in either case.* The through rate to Nashville, hereinbefore stated, is less than the local rates from these several places (*i. e.*, Cincinnati, Louisville and Evansville) plus the Trunk Line rates from the seaboard to each of them respectively, that is, less than the amount produced by adding the locals from Cincinnati, Louisville or

Evansville (to Nashville) to the eastern rates severally applied to those towns (i. e., Cincinnati, Louisville and Evansville). For this reason, the Nashville rate may be said to be made by 'arbitrary' additions to the Trunk Line rates to the intermediate points (i. e., Cincinnati, Louisville & Evansville). On the other hand, a comparison of these additions with the distances to Nashville from the several points mentioned (i. e., Cincinnati, Louisville and Evansville) shows that they give substantially the same rate per ton per mile in each case—one and seven-tenths cents—as the Trunk Line rate per ton per mile east of those points (i. e., Cincinnati, Louisville and Evansville). *Practically, therefore, the Nashville rate by the several routes now under consideration (i. e., the routes via the Ohio river crossings), is an extension of the Trunk Line rate to that point (i. e., Nashville) the total charge being divided between the several carriers in nearly the exact proportion to the mileage operated by each.*"

Trans. pp. 42-43.

"The general range of rates in the territory covered by the Southern Railway & Steamship Association is materially higher than in the territory of the Trunk Line Association, *the difference resulting mainly from the much greater volume of traffic in the latter section.*"

Trans. p. 48.

"*The competitors of the defendants for this Nashville traffic, therefore, are the railroads from the Atlantic Seaboard reaching Nashville by way of Cincinnati, etc.*, all of which are interstate carriers, subject to the Act to Regulate Commerce. *These carriers established rates and united in joint tariffs from eastern points to Nashville long before the lines through Chattanooga engaged in the Nashville business. The acceptance of the rates so fixed by the rail lines via Cincinnati was the necessary condition upon which the lines via Chattanooga could compete for Nashville traffic.*"

Trans. p. 49.

X.

THE COMMISSION'S FINDING AS TO HOW RATES ARE MADE FROM THE NORTH ATLANTIC SEABOARD TO MEMPHIS.

The Commission finds and reports that:

"The traffic from Atlantic Seaboard points to Memphis is also divided between several independent routes. One of these general routes is by the all-rail lines through Cincinnati, Louisville, Evansville, etc. The Memphis through rate is the Trunk Line rate to Cincinnati, etc., plus certain additions which are less than the local rates from those points (i. e., Cincinnati, Louisville and Evansville) to Memphis."

"A comparison of these additions with the distances from Cincinnati, etc., shows that *the Memphis through rate, like the Nashville through rate, is in effect an extension of the Trunk Line rate* to Memphis, the total charge being divided between the different carriers in proportion to their respective mileage."

Trans. p. 44.

XI.

THE COMMISSION'S FINDING AS TO HOW RATES ARE MADE FROM THE NORTH ATLANTIC SEABOARD TO CHATTANOOGA.

The Commission finds and reports that:

"As appear from tariffs on file with the Commission, the following cities and towns, among others, are grouped with Chattanooga and take the same *rail and water* rates on classified traffic, to wit:

"Dalton, Rome, Atlanta, Americus, Athens, Columbus, Fort Gaines and Griffin in the State of Georgia; Huntsville, Decatur, Sheffield, Tuscumbia, Florence, Gadsden, Oxford, Talladega, Anniston, Birmingham, Opelika, Montgomery, Selma, and Eufaula, in the State of Alabama; and Enterprise and Meridian, in the State of Mississippi. Of these, Dalton, Rome, Atlanta, Americus, Athens, Columbus, Griffin, Anniston, Gadsden, Oxford,

Opelika and Eufaula have higher *all-rail* class rates than Chattanooga, ..."

Trans. p. 48.

"The rates to Chattanooga and the above-named common points, both *rail and water* and *all rail, are established by the Southern Railway & Steamship Association*, of which the defendant lines herein are members, and all traffic to those points is governed by the classification of that association. The traffic to Nashville and Memphis, however, irrespective of the route by which it is transported, is governed by the Official or Trunk Line Classification."

Trans. p. 48.

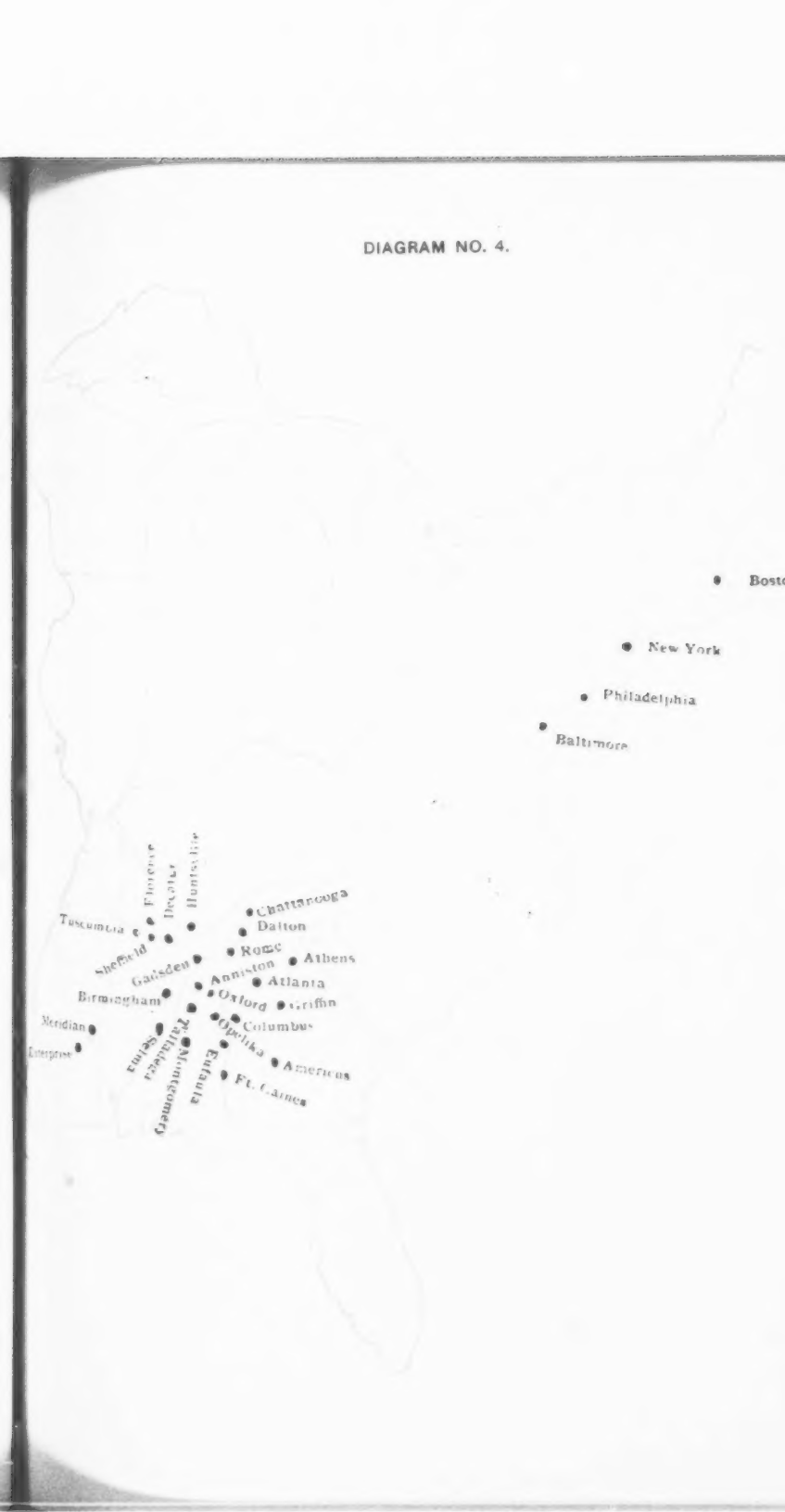
"The general range of rates in the territory covered by the Southern Railway & Steamship Association is materially higher than in the territory of the Trunk Line Association, *the difference resulting mainly from the much greater volume of traffic in the latter section;* and it is inevitable that difficulties should exist and complaints arise along the line of division between varying systems of classification and unlike methods of tariff construction."

Trans. p. 48.

Chattanooga and the Southern cities and towns with which she is grouped for the purpose of making rates from the North Atlantic Seaboard are shown on Diagram No. 4.

The Commission also finds and reports that a portion of the traffic from the North Atlantic Seaboard to Chattanooga "goes by the Trunk Lines to Cincinnati, and thence by the Cincinnati Southern Railroad, now controlled by the Cincinnati, New Orleans & Texas Pacific Company. The through rates by this route, as in the case of Nashville and Memphis, is made by adding to the Trunk Line rates to Cincinnati certain amounts which represent the proportion of the total charge taken by the carrier from Cincinnati to Chattanooga (i. e., the C., N. O. & T. P. Ry. Co.). The additions so made give a considerably greater rate per ton per mile for this portion of the haul than the Trunk Line rate east of Cincinnati, but they are, at the same time, ma-

DIAGRAM NO. 4.


Bost
New York
Philadelphia
Baltimore
Florence
Decatur
Huntsville
Tuscumbia
Sheffield
Chattanooga
Dalton
Rome
Gadsden
Anniston
Athens
Atlanta
Birmingham
Oxford
Griffin
Meridian
Talladega
Columbus
Opelika
Enterprise
Eufaula
Americus
Montgomery
Ft. Gaines

20322

terially less than the local rates between those points" (i. e., between Cincinnati and Chattanooga).

Trans. p. 44.

XII.

The Commission's Finding as to the Relative Rates from New York and Boston to Chattanooga, Nashville and Memphis, Respectively.

The Commission finds and reports that:

"The following are the through rates from New York and Boston to Chattanooga, Nashville and Memphis, respectively:

Classes	1	2	3	4	5	6
To Chattanooga	114	98	86	73	60	49
To Memphis, 310 miles farther	100	85	65	45	38	35
To Nashville, 151 miles farther	91	78	60	42	36	31

"It thus appears that the rates from New York and Boston are less to Nashville than to Chattanooga, on the six numbered classes, respectively, by 23 cents, 20 cents, 26 cents, 31 cents, 24 cents, and 18 cents; and less to Memphis than to Chattanooga by 14 cents, 13 cents, 21 cents, 28 cents, 22 cents, and 14 cents. These differences prevail in favor of Nashville and Memphis on all goods transported to those cities from Eastern Seaboard points through Chattanooga—the distance to Nashville being 151 miles, and to Memphis 310 miles, farther than to Chattanooga."

Trans. p. 42.

XIII.

The Commission's Finding as to the Effect Produced by the Disparity of Rates Upon the Commerce of Chattanooga.

The Commission finds and reports that:

"The city of Chattanooga is in Southeastern Tennessee, on the river bearing the same name as the State. *During the last ten years, especially, its growth has been extremely rapid, and it has*

become a manufacturing and commercial point of considerable importance. It competes for the trade of the surrounding country, largely in the same territory as Nashville, and also, to some extent, in the same territory as Memphis. By reason of the disparity in charges on shipments from the east, in favor of Nashville and Memphis, Chattanooga is placed at serious disadvantage in this competition and its business materially lessened. The tendency of existing rates to these rival towns is to limit the area in which eastern merchandise can be profitably distributed from Chattanooga, and to impede the growth and prosperity of that city, which would naturally result from the development of its wholesale trade.

"Under the tariffs now in force, goods may be carried from the east through Chattanooga to Nashville, and back through Chattanooga to points south and east, and there sold at lower prices than Chattanooga merchants can sell for; and this appears to have actually occurred in many instances. On a carload of first-class freight, 40,000 pounds, the charges to Chattanooga, at $1.14 per hundred, amount to $456.00; while to Nashville, at 91 cents, the charges are only $364.00, making a difference of $92.00 in favor of Nashville, the longer haul by 151 miles. On fourth-class freight the advantage in favor of Nashville is $124.00 per car, and on sixth-class, $72.00. The advantage in favor of Memphis, a longer haul by 310 miles, is also large.

Trans. p. 47.

"The proportion of the Nashville through rate, charged on a ton of first-class goods from Cincinnati to Nashville, via the Louisville & Nashville Railroad, a distance of 295 miles, is $5.20, while the proportion of the Chattanooga through rate, charged from Cincinnati to Chattanooga, via the Cincinnati Southern Railway, a distance of 335 miles (only 40 miles further), is $9.80.

"It is quite unnecessary to multiply examples showing the differences resulting from these relative rates in the transportation charges on eastern merchandise to these several towns.—(Chattanooga, Nashville and Memphis), as their necessary effect in limiting the distance to which distribution from Chattanooga

can be profitably effected, is sufficiently obvious without further illustration."

Trans. p. 48.

XIV.

The Commission's Finding That There is no Water Competition at Nashville.

The Commission finds and reports that:

"There are no through lines by water from Cincinnati to Nashville, but a few boats are run from Cincinnati to Paducah, Ky., and two or three a week, carrying from six to eight carloads each, from Paducah to Nashville. Boats are unloaded and loaded again at Paducah. No eastern business of any consequence is done, and these water lines have no agents to solicit eastern trade. Their traffic is from Ohio River points. The Atlantic Seaboard shipments to Nashville by way of *Cincinnati* are carried wholly by rail.

Trans. p.p. 48, 49.

"The lower Cumberland River, on which Nashville is situated, is navigable about nine months in the year, and boats run that number of months on an average. Many years ago, before the days of railroads, there were through lines of boats to Nashville from Cincinnati and other cities, but they have all been discontinued *on account of the rates and facilities afforded by the railroads.* The railroads have the advantage in time, insurance and handling. If goods were shipped from the east and sent by water from *Cincinnati* to Nashville, they would have to be unloaded from the cars and loaded in boats at Cincinnati, and loading and unloading would also be necessary at Paducah. A through line of boats was established and kept up with difficulty for some time after the war, but was long ago abandoned. The uncertainty of return cargoes from Nashville would apparently prevent the maintenance of such a line of boats at the present time, even if secured against a reduction of rates by the railroads.

"The lower rates accepted by the carriers engaged in the transportation of eastern merchandise to Nashville *via Chattanooga* are not forced upon them by any *water* competition at the former place. In performing this service for the compensation fixed by the present tariffs, these carriers are not affected by the circumstance that water communication exists between *Cincinnati* and Nashville.

Trans p. 49.

"As already stated, the through rate to Nashville by the Cincinnati route is made by certain additions to the Trunk Line rate from the east to the latter point. *The amount of such additions was doubtless fixed originally with reference to the water rates between those cities, and it may be that the possibilities of water carriage have some influence in maintaining the present figures.* But we are far from satisfied, and refuse to find on the evidence in this case, that there is any actual *water* competition for traffic from Atlantic points to Nashville, or that the Louisville & Nashville Road is forced to take such traffic at the compensation now received by it, because of river communication between *Cincinnati* and Nashville, furnishing the opportunity for such competition. *The river rates between those places are now considerably lower than the rail rates,* and more or less of the local traffic goes by water; but the through business from Atlantic cities, saving the time, distance and cost of breaking bulk at Cincinnati, would continue to go by rail, in our judgment, even if the disparity between land and water rates were materially greater than it is now. *There might, of course, be such an advance in rail rates that shipments from the east would take the water route from Cincinnati.* What amount of difference would produce that result it is impossible to determine from the testimony; but we find that such difference might be substantially greater than it is at present without important effect upon the railroad tonnage from the east, and that the through rate to Nashville is in no sense controlled by *water competition* at that point, either actually encountered or seriously apprehended."

Trans. pp. 49, 50.

It will be noticed that the Commission's finding is restricted to water competition from *Cincinnati* to Nashville; and that no

consideration is given by the Commission to competition by water from *Evansville* to Nashville.

XV.

The Commission's Finding as to the Rail Competition that Exists at Nashville; and as to its Effect Upon Appellants' Rates to Nashville.

The Commission finds and reports that:

"*The Nashville rate is independent of the lines operating through Chattanooga, and those lines have no voice in determining its amount. That rate is made by the all-rail carriers via Cincinnati, and their action is uncontrolled by the defendant lines.* The competition which the latter meet at Nashville is distinctly the competition of the Trunk Lines and the Louisville & Nashville system, whose northern termini are at points on the Ohio River, which receive Trunk Line rates on eastern shipments. The competitors of the defendants for this Nashville traffic, therefore, are the railroads from the Atlantic Seaboard reaching Nashville by way of Cincinnati, etc., all of which *are interstate carriers, subject to the Act to Regulate Commerce.* These carriers established rates and united in joint tariffs from eastern points to Nashville *long before the lines through Chattanooga engaged in the Nashville business. The acceptance of the rates so fixed by the rail lines via Cincinnati was the necessary condition upon which the lines via Chattanooga could compete for Nashville traffic.*"

Trans. p. 49.

Again the Commission says:

"In other words, the real competitors of the defendants for this transportation are the all-rail carriers reaching Nashville by way of Cincinnati, and those carriers *are confessedly amenable to the Act to Regulate Commerce.*"

Trans. p. 52.

Again the Commission says:

"It is stated in the foregoing findings that *the present Nashville rate is prescribed by the rail lines reaching that point via Cincinnati, and that the defendant lines through Chattanooga have no voice or influence in determining its amount. These lines are under compulsion, therefore, to meet the rates which other carriers have established, or leave those carriers in undisturbed possession of the entire traffic. They have no alternative but to accept the measure of compensation dictated by independent rivals or abandon the large percentage of Nashville business, which they now secure.* In addition to this, the geographical position of these two cities (i. e., Chattanooga and Nashville), the diverse character and divergent courses of the several groups of lines which connect them with the Atlantic Seaboard, the varying systems of classification by which they are severally affected, *and the greater volume of traffic, at the lower rates prevailing in the Trunk Line territory*, are existing conditions which govern, to some degree, at least, the transportation in question. *For these conditions the carriers complained of do not appear chiefly responsible, because the lower rate to Nashville is beyond their control* AND THE ALLOWANCE OF THE SAME RATE TO THE SHORTER DISTANCE POINT MIGHT REDUCE THEIR REVENUES BELOW THE LIMITS OF FAIR COMPENSATION."

Trans. pp. 53, 54.

XVI.

The Commission's Finding That the Nashville Rate Yields a Profit Over the Additional Cost of Movement.

The Commission finds and reports that:

"There is a conceded margin of profit in the rates now in force to Nashville and Memphis, *with reference to the additional expense incurred in carrying eastern traffic to those destinations, but whether that margin affords reasonable compensation for the services thus rendered cannot be determined from the evidence.*"

Trans. p. 51.

XVII.

The Commission's Finding as to the Water Competition That Exists at Memphis and as to its Effect Upon Appellants' Rates to Memphis.

The Commission finds and reports that:

"The defendant lines actually meet water competition at that point which is direct and to a large degree controlling. The heavy shipments from the Atlantic Seaboard to Memphis go for the most part by way of New Orleans, and the carriers complained of in this proceeding make little effort to compete with the water lines on traffic of that description. At least a third of the entire volume of eastern merchandise appears to reach Memphis by ocean steamer to New Orleans, and thence by water or rail to destination."

Trans. p. 50.

XVIII.

The Conclusion of Law Reported by the Commission to the Effect that the Appellants Have no Right to Take Into Consideration the Rail Competition at Nashville.

The Commission says:

"In other words, the real competitors of the defendants for this transportation are the *all-rail* carriers reaching Nashville by way of Cincinnati, and those carriers are confessedly *amenable to the Act to Regulate Commerce*. If these views are correct, they control, prima facie at least, the determination of this case, for the primary question involved has been recently decided by the Commission."

Trans. p. 52.

"In a series of proceedings instituted by the Georgia Railroad Commission, we have taken occasion to review, with much care, the fourth section of the Statute, familiarly known as 'the

long and short haul clause,' and have given it a construction intended to have general application.

Ga. R. R. Com. vs. Clyde Steamship Company et al., 4 Inters. Com. Rep. 120, 5 I. C. C. Rep., 324.

"The consideration which this feature of the law received in the cases here referred to, and the reasons advanced for the conclusions therein announced, will appear from an examination of the Report of the Commission in those cases, made public a few weeks ago, and need not be repeated in this opinion. The proposition which distinctly applies to the present proceeding was stated with conciseness in the following language:

'The carrier has the right to judge, in the first instance, whether it is justified in making the greater charge for the shorter distance under the fourth section in all cases where the circumstances and conditions arise wholly upon its own line or through competition for the same traffic with carriers *not subject to regulation under the Act to Regulate Commerce.* In other cases under the fourth section, the circumstances and conditions are not, presumptively, dissimilar, and carriers must not charge less for the longer distance, except upon the order of this Commission.'

"This ruling is directly in point and conclusive upon the primary issue in this controversy, because the competitors of the defendants for the Nashville traffic in question are themselves interstate carriers by rail and *subject, in all respects, to the Act to Regulate Commerce.*

Trans. pp. 52, 53.

XIX.

The Conclusion of Law Reported by the Commission in Regard to the Reasonableness of the Chattanooga Rates.

The Commission says:

"*These lines* (i. e., the appellants') *are under compulsion, therefore, to meet the rates which other carriers have established, or leave those*

carriers in undisturbed possession of the entire traffic. They have no alternative but to accept the measure of compensation dictated by independent rivals or abandon the large percentage of Nashville business which they now secure. In addition to this, the geographical position of these two cities (i. e., Chattanooga and Nashville), the diverse character and divergent courses of the several groups of lines which connect them with the Atlantic Seaboard, the varying system of classifications by which they are severally affected, *and the greater volume of traffic, at the lower rates prevailing in the Trunk Line territory*, are existing conditions which govern, to some degree at least, the transportation in question. *For these conditions the carriers complained of do not appear chiefly responsible, because the lower rate to Nashville is beyond their control, and* THE ALLOWANCE OF THE SAME RATE TO THE SHORTER DISTANCE POINT (I. E., CHATTANOOGA) MIGHT REDUCE THEIR REVENUES BELOW THE LIMITS OF FAIR COMPENSATION."

Trans. pp. 53, 54.

"*It seems improbable that the discrimination complained of can be made less oppressive by any increase in the Nashville rate*, and on that assumption the only practical relief is a reduction in rates to Chattanooga. We are aware of the difficulties attending a readjustment upon that basis, but we cannot regard them insuperable. On the contrary, we firmly believe that the eastern rates to this point (i. e., Chattanooga) can be materially reduced without injustice to the defendants and without serious disturbance to the general scheme of tariff construction with which that rate is connected. Compared with rates to other points and on other lines, for similar distances and a corresponding volume of traffic, the rate to Chattanooga seems extremely liberal, to say the least; *while a strong presumption of its unreasonableness is created by the voluntary action of the defendants themselves in seeking business at decidedly lower rates to points much more remote.* When these carriers, for instance, charge 73 cents per hundred pounds on fourth-class freight from New York to Chattanooga, and at the same time carry like shipments 150 miles further to Nashville for 42 cents a hundred, and do this not incidentally, but

for a series of years, the belief that the higher rate is excessive becomes a positive conviction."

Trans. p. 54.

"We entertain little doubt, therefore, that equity between shipper and carrier requires *some* reduction in the rates now enforced on Chattanooga traffic from Atlantic points, and are convinced of the necessity for such a reduction to secure relative justice between that town and Nashville. We refrain from further statement of the reasons which have induced this conclusion, AS THE AMOUNT TO WHICH THE CHATTANOOGA RATE SHOULD BE REDUCED WILL NOT NOW BE DECIDED."

Trans. pp. 54, 55.

Again the Commission says:

"In addition to this, it may be remarked that the complainant's case was presented on the theory that the prohibitive requirement of the statute should be strictly enforced against these defendants, while they in turn contended that the full difference now maintained between rates to Chattanooga and to Nashville was justified by the necessities of the situation. *The question which may arise, if permission is sought to depart from the general rule relating to long and short hauls, was not specially discussed.* On this ground, also, IT WOULD SEEM SUITABLE TO ALLOW OPPORTUNITY FOR A FURTHER HEARING BEFORE FIXING MAXIMUM RATES ON SHIPMENTS TO CHATTANOOGA."

Trans. p. 55.

XX.

THE ORDER MADE BY THE COMMISSION.

On December 30, 1892, the Commission ordered the defendants to the petition filed before the Commission "or such of them as are or may be engaged in the transportation of property from New York and other North Atlantic seaboard points to Chattanooga or through Chattanooga to Nashville in the State of Tennessee" . . . . "to cease and desist from charging or receiving any greater compensation in the aggregate for the trans-

portation of like kind of property from New York, Boston, Philadelphia, Baltimore, or other Atlantic Seaboard cities, for the shorter distance to Chattanooga than for the longer distance over the same line in the same direction to Nashville."

Trans. pp. 56, 57.

The Commission made no order and gave no directions with regard to charging a greater compensation in the aggregate for the shorter distance to Chattanooga than for the longer distance over the same line in the same direction to Memphis.

The Report and Opinion of the Commission will be found in Trans. p. 37, et seq.

XXI.

Proceedings in the Circuit Court.

The defendants to the petition filed before the Commission, (i. e., the appellants) conceiving that the order made by the Commission was not lawful, declined to obey the same; whereupon the Interstate Commerce Commission filed a petition against them in the Circuit Court of the United States for the Eastern District of Tennessee to enforce said order against them.

Said defendants answered said petition denying the matters of equity alleged by them; and all further proceedings were by consent of parties allowed to remain in abeyance to await the decision of the Supreme Court in what is known as the "Social Circle Case," reported under the style of C. N. O. & T. P. Ry. Co. et al. vs. I. C. C., 162 U. S., 195 et seq.

The parties not being able to agree as to the effect of the decision of the Supreme Court in the "Social Circle Case," the proceedings in this case were allowed to remain in further abeyance to await the decision of the Supreme Court in the case of the Interstate Commerce Commission vs. Alabama Midland Railway Co. et al.

168 U. S., 144 et seq.

The result was that the testimony in the Circuit Court was not taken in this case until the summer of 1897. The case came

on for hearing in the Circuit Court upon petition, answers and proof on December 13 and 14, 1897, before the Hon. Henry F. Severens; who, on February 2, 1898, rendered a decree against the defendants affirming the order of the Commission.

Trans. p. 381.

From said decree, said defendants (the appellants) prayed and obtained an appeal to the U. S. Circuit Court of Appeals on February 2d, 1898.

Trans. pp. 389, 390.

XXII.

Proceedings in the Circuit Court of Appeals.

The case was heard in the Circuit Court of Appeals on June 1 and 2, 1898.

Trans. pp. 392, 393.

On November 13, 1899, the Circuit Court of Appeals rendered a decree affirming the decree of the Circuit Court.

Trans. p. 393.

The appellants prayed and obtained an appeal to this Court on November 22, 1899.

Trans. p. 400.

XXIII.

Assignment of Errors.

The appellants, the East Tennessee, Virginia & Georgia Railway Company; the Norfolk & Western Railroad Company; the Norfolk & Western Railway Company; the Old Dominion Steamship Company; the Western & Atlantic Railroad Company; the Central Railroad & Banking Company of Georgia, and the Louisville & Nashville Railroad Company, sued by the name of the Georgia Railroad Company; the Ocean Steamship Company; the Cincinnati, New Orleans & Texas Pacific Railway Company; the Nashville, Chattanooga & St. Louis Railway; the Southern

Railway Company; the Central Railroad & Banking Company of Georgia; and the Central of Georgia Railway Company, say that in the above mentioned decree, rendered by said United States Circuit Court of Appeals for the Sixth Circuit, on the 13th day of November, 1899, and in the record and proceedings in said Court, in this cause, there is manifest error in this, to wit:

I.

That said Circuit Court of Appeals erred in affirming the decree rendered in the above entitled cause, on the 2d day of February, 1898, by the Circuit Court of the United States for the Eastern district of Tennessee, with costs.

II.

That the said Circuit Court of Appeals erred in not reversing the decree rendered in the above entitled cause on the 2d day of February, 1898, by the Circuit Court of the United States for the Eastern District of Tennessee.

III.

That said Circuit Court of Appeals erred because it failed to adjudge and decree that the matters of equity alleged in the petition or bill, filed in the above entitled cause, in said Circuit Court of the United States for the Eastern District of Tennessee, by the appellee as complainant against the above-named appellants, as defendants, are fully denied in the answers and are not sustained by the proof, and that such petition or bill be dismissed with costs.

IV.

That said Circuit Court of Appeals erred because it, in effect, adjudged and decreed that the order made by the Interstate Commerce Commission, on the 30th day of December, A. D., 1892, in the case of the Board of Trade of Chattanooga vs. the East Tennessee, Virginia & Georgia Railway Company et al. is a

lawful order, and should be enforced; whereas, said order is unlawful and void, and should not be enforced.

V.

That said Circuit Court of Appeals erred in decreeing that the above-named appellants pay the costs.

VI.

That said Circuit Court of Appeals erred in decreeing, in effect, that the above named appellants, or such of them as are or may be engaged in the transportation of property from New York and other Atlantic seaboard points to Chattanooga, or through Chattanooga to Nashville, in the State of Tennessee, be required to cease and desist from charging or receiving any greater compensation in the aggregate for the transportation of like kind of property from New York, Boston, Philadelphia, Baltimore, or other Atlantic Seaboard cities, for the shorter distance to Chattanooga than for the longer distance over the same line, in the same direction, to Nashville.

VII.

That said Circuit Court of Appeals erred in not deciding that the rates charged by the above-named appellants for the transportation of property from New York, Boston, Philadelphia, Baltimore, and other Atlantic seaboard cities, to Chattanooga, are just and reasonable.

VIII.

That said Circuit Court of Appeals erred in not deciding that the transportation of property, by the above-named appellants, from New York, Boston, Philadelphia, Baltimore, or other Atlantic Seaboard cities, to Chattanooga, Tennessee, is not a like and contemporaneous service, and is not done under substantially similar circumstances and conditions, with the transportation of

property by the above-named appellants from New York, Boston Philadelphia, Baltimore, or other Atlantic Seaboard cities, to Nashville, Tennessee.

IX.

That said Circuit Court of Appeals erred in not deciding that the above-named appellants in making a greater charge in the aggregate for the transportation of property carried by them from New York, Boston, Philadelphia, Baltimore, or other Atlantic Seaboard cities, to Chattanooga, Tennessee, than they make on such property carried by them from New York, Boston, Philadelphia, Baltimore, or other Atlantic Seaboard cities, to Nashville, Tennessee, do not thereby give to Nashville, Tennessee, or its traffic an undue or unreasonable preference or advantage, and do not subject Chattanooga, Tennessee, or its traffic to an undue or unreasonable prejudice or disadvantage.

X.

That said Circuit Court of Appeals erred, because it, in effect, decided that the transportation by the above named appellants of property carried by them from New York, Boston, Philadelphia, Baltimore or other Atlantic Seaboard cities to Chattanooga, Tennessee, is transportation conducted under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, as compared with the transportation by the above-named appellants of property carried by them from New York, Boston, Philadelphia, Baltimore, or other Atlantic Seaboard cities, to Nashville, Tennessee.

XI.

That said Circuit Court of Appeals erred because it, in effect, decided that the appellee, the Interstate Commerce Commission, has the power to fix the rates of transportation to be charged by the above-named appellants for property carried by them from

New York, Boston, Philadelphia, Baltimore or other Atlantic Seaboard cities to Chattanooga, Tennessee, and to Nashville, Tennessee, respectively.

Wherefore the above named appellants (the East Tennessee, Virginia & Georgia Railway Company; the Norfolk & Western Railroad Company; the Norfolk & Western Railway Company; the Old Dominion Steamship Company; the Western & Atlantic Railroad Company; the Central Railroad & Banking Company of Georgia, and the Louisville & Nashville Railroad Company, sued by the name of the Georgia Railroad Company; the Ocean Steamship Company; the Cincinnati, New Orleans & Texas Pacific Railway Company; the Nashville, Chattanooga & St. Louis Railway; the Southern Railway Company; the Central Railroad & Banking Company of Georgia; and the Central of Georgia Railway Company), pray that said decree of said United States Circuit Court of Appeals for the Sixth Circuit, rendered in the above entitled cause on the 13th day of November, 1899, be reversed, and that said court be ordered to enter a decree reversing the said decree rendered on the 2nd day of February, 1898, in the above entitled cause, by the said Circuit Court of the United States for the Eastern District of Tennessee, and ordering said petition or bill filed by said Interstate Commerce Commission in said Circuit Court to be dismissed with costs.

ED BAXTER,

Of Counsel for the above named Appellants.

XXIV.

ARGUMENT.

THE ORDER MADE BY THE COMMISSION IN THIS CASE WAS BASED EXCLUSIVELY UPON THE FOURTH SECTION OF THE ACT TO REGULATE COMMERCE.

The Commission did not base the order made by it in this case either upon the first section, which relates to the reasonableness of rates; nor upon the second section, which relates to unjust discrimination in rates; nor upon the third section, which

relates to unjust prejudice in rates. The Commission based said order upon the fourth section alone; it being the section which relates to charging more for a short than for a long haul.

The material part of the order is as follows:

That the appellants "or such of them as are or may be engaged in the transportation of property from New York and other Atlantic Seaboard points to Chattanooga or through Chattanooga to Nashville, in the State of Tennessee, be and they severally are hereby required to cease and desist from charging or receiving any greater compensation in the aggregate for the transportation of like kind of property from New York, Boston, Philadelphia, Baltimore, or other Atlantic Seaboard cities, for the shorter distance to Chattanooga than for the longer distance over the same line in the same direction to Nashville."

Trans. pp. 56, 57.

The words "charging or receiving any greater compensation in the aggregate for the transportation of like kind of property for the shorter distance than for the longer distance over the same line, in the same direction" are taken literally from the fourth section of the Act to Regulate Commerce; and they are not to be found in any other section of the Act.

The contest before the Commission was regarded by both parties as a contest falling exclusively under the fourth section. Neither of the parties regarded it as a contest involving the question as to what are just and reasonable rates to Chattanooga under the first section; nor as to whether the rates unjustly discriminate against Chattanooga under the second section; nor as to whether the rates subject Chattanooga to an undue prejudice or disadvantage under the third section.

Neither of the parties conducted the case before the Commission upon the idea that the Commission would undertake to fix, or even suggest, what would be reasonable rates to Chattanooga; nor to decide what reduction in the present rates to Chattanooga would remove the discrimination against that city; nor to decide what reduction in those rates would relieve Chattanooga from

undue prejudice or disadvantage. The testimony before the Commission, and the Report and Opinion of the Commission itself, proceeded upon the theory that the proper construction of the *fourth* section was the *only* question submitted to the Commission.

That I am right in this contention is manifest from the following language used by the Commission:

"We entertain little doubt, therefore, that equity between shipper and carrier requires some reduction in the rates now enforced on Chattanooga traffic from Atlantic points, and are convinced of the necessity for such a reduction to secure relative justice between that town and Nashville. *We refrain from further statement of the reasons which have induced this conclusion*, AS THE AMOUNT TO WHICH THE CHATTANOOGA RATE SHOULD BE REDUCED WILL NOT NOW BE DECIDED." . . . .

Trans. p. 54.

"In addition to this, it may be remarked that the complainant's case was presented on the theory that the prohibitive requirements of the statute (i. e., the long and short haul clause) should be strictly enforced against these defendants, while they in turn contended that the full difference now maintained between rates to Chattanooga and to Nashville was justified by the necessities of the situation. The question (i. e., as to what the relative rates to Chattanooga as compared with the rates to Nashville should be) which may arise, if permission (from the Commission) is sought to depart from the general rule relating to long and short hauls, was not specially discussed. On this ground, also, IT WOULD SEEM SUITABLE TO ALLOW OPPORTUNITY FOR A FURTHER HEARING BEFORE FIXING MAXIMUM RATES ON SHIPMENTS TO CHATTANOOGA."

Trans. p. 55.

"These lines (i. e., the appellants), are under compulsion, therefore, to meet the rates which other carriers have established, or leave those carriers in undisturbed possession of the entire traffic. They have no alternative but to accept the measure of compensation dictated by independent rivals or abandon the

large percentage of Nashville business which they now secure. In addition to this, the geographical position of these two cities (i. e., Chattanooga and Nashville), the diverse character and divergent courses of the several groups of lines which connect them with the Atlantic Seaboard, the varying systems of classifications by which they are severally affected, and the greater volume of traffic, at the lower rates prevailing in the Trunk Line territory, are existing conditions which govern, to some degree at least, the transportation in question. For these conditions the carriers complained of do not appear chiefly responsible, because the lower rate to Nashville is beyond their control, AND THE ALLOWANCE OF THE SAME RATE TO THE SHORTER DISTANCE POINT (I. E., CHATTANOOGA) MIGHT REDUCE THEIR REVENUES BELOW THE LIMITS OF FAIR COMPENSATION."

Trans. pp. 53, 54.

The Commission found and reported that "it seems improbable that the discrimination complained of can be made less oppressive *by any increase in the Nashville rate.*"

Trans. p. 54.

In other words, the competitive circumstances and conditions at Nashville are such that the Nashville rate cannot be increased.

The decree of the Circuit Court, affirmed by the Court of Appeals, orders that the Chattanooga rate shall not be higher than the Nashville rate.

Trans. p. 381.

As competitive circumstances and conditions render it impossible to increase the Nashville rate; the decree of the Circuit Court, in effect, orders that the Chattanooga rate be reduced to the Nashville rate; and this is so, notwithstanding the fact that the Commission reported that "the allowance of the same rate to the shorter distance point (i. e., Chattanooga), *might reduce their* (i. e., the appellants') *revenues below the limits of fair compensation.*"

Trans. pp. 53, 54.

As the Commission determined to dispose of the case upon the fourth section alone, it distinctly announced that "the amount to which the Chattanooga rate should be reduced will not now be decided."

Trans. p. 54.

And that a further hearing should be had "*before fixing maximum rates on shipments to Chattanooga.*"

Trans. p. 55.

As it is impossible to increase the Nashville rate, the Circuit Court, in decreeing that the Chattanooga rate shall not exceed the Nashville rate, fixes the latter as the maximum rate for Chattanooga, notwithstanding the Commission said that a further hearing should be had before fixing maximum rates for Chattanooga.

XXV.

The Commission Found as a Fact That Effective Rail Competition Exists at Nashville.

While the Commission found, as a fact, that there is no *water* competition from *Cincinnati* to Nashville, it also found, as a fact, that *rail* competition *does* exist at Nashville; and that it is of controlling force and effect upon the rates which the appellant railroads operating through Chattanooga must accept upon such traffic as they carry from eastern cities to Nashville.

The Commission says:

"3. There are a number of routes by which traffic from the Eastern Seaboard is carried to Nashville. These may be separated into two classes or groups; one consisting of the lines passing through Chattanooga, the other of the lines passing through Cincinnati, Louisville, Evansville, and possibly other points north of Chattanooga. How the aggregate through business to Nashville is divided between these different routes was not very definitely shown, but it is fairly inferable from the evidence that *the lines through Chattanooga carry fifty to sixty per cent. of the total tonnage.*"

Trans. p. 42.

Again the Commission says:

"There may be other routes or lines by which traffic from the Atlantic Seaboard reaches Nashville, Memphis or Chattanooga, but the foregoing are those by which the great bulk of eastern shipments is carried to these several points, and the only ones which need to be considered in this investigation. *The rates to each of these towns are the same by whatever route the transportation is effected*, except the rate to Memphis via New Orleans."

Trans. p. 45.

Again the Commission says:

"The Nashville rate *is independent of the lines operating through Chattanooga and those lines have no voice in determining its amount. That rate is made by the all-rail carriers via Cincinnati, and their action is uncontrolled by the defendant lines. The competition which the latter meet at Nashville is distinctly the competition of the Trunk Lines, and the Louisville & Nashville system, whose northern termini are at points on the Ohio River, which receive Trunk Line rates on eastern shipments. The competitors of the defendants for this Nashville traffic, therefore, are the railroads from the Atlantic Seaboard reaching Nashville by way of Cincinnati, etc.*, ALL OF WHICH ARE INTERSTATE CARRIERS SUBJECT TO THE ACT TO REGULATE COMMERCE. These carriers established rates and united in joint tariffs from eastern points to Nashville long before the line through Chattanooga engaged in the Nashville business. *The acceptance of the rates so fixed by the rail line via Cincinnati was the necessary condition upon which the lines via Chattanooga could compete for Nashville traffic.*"

Trans. p. 49.

Again the Commission says:

"In the findings of fact above set forth we have stated that the rates accepted for carrying eastern traffic to Nashville through Chattanooga are not influenced by *water* competition at the terminal point, but that the sole competition for Nashville business

from the Atlantic Seaboard *comes from the all-rail lines reaching the same destination by way of Cincinnati.*"

Trans. p. 52.

Again the Commission says:

"It is stated in the foregoing findings that the present Nashville rate is prescribed by the rail lines reaching that point via Cincinnati, and that *the defendant lines through Chattanooga have no voice or influence in determining its amount.* THESE LINES ARE UNDER COMPULSION, THEREFORE, TO MEET THE RATE WHICH OTHER CARRIERS HAVE ESTABLISHED, OR LEAVE THOSE CARRIERS IN UNDISTURBED POSSESSION OF THE ENTIRE TRAFFIC. THEY HAVE NO ALTERNATIVE BUT TO ACCEPT THE MEASURE OF COMPENSATION DICTATED BY INDEPENDENT RIVALS, OR ABANDON THE LARGE PERCENTAGE OF NASHVILLE BUSINESS, WHICH THEY NOW SECURE. In addition to this, the geographical position of these two cities, the diverse character and divergent courses of the several groups of lines which connect them with the Atlantic Seaboard, the varying systems of classification by which they are severally affected, and the greater volume of traffic at the lower rates prevailing in the Trunk Line territory, are existing conditions which govern, to some degree at least, the transportation in question. For these conditions the carriers complained of do not appear chiefly responsible, BECAUSE THE LOWER RATE TO NASHVILLE IS BEYOND THEIR CONTROL, AND THE ALLOWANCE OF THE SAME RATE TO THE SHORTER DISTANCE POINT MIGHT REDUCE THEIR REVENUES BELOW THE LIMITS OF FAIR COMPENSATION."

Trans. pp. 53, 54.

The foregoing quotations from the Report and Opinion of the Commission show conclusively that there is actual *rail* "competion at Nashville."

They show that the rates from the eastern cities to Nashville are the same, whether the traffic be carried by the appellant rail lines operating through Chattanooga, or by the rival rail lines operating through Cincinnati.

They show that competition not only actually exists, but

that it exists with reference to traffic important in amount; because the Commission finds that the "lines through Chattanooga carry fifty to sixty per cent. of the total tonnage."

They show not only that competition exists at Nashville, and that it exists in regard to traffic important in amount; but they also show that the competition is absolutely controlling in its effect. The Commission finds in so many words, that "THE NASHVILLE RATE IS INDEPENDENT OF THE LINES OPERATING THROUGH CHATTANOOGA, AND THOSE LINES HAVE NO VOICE IN DETERMINING ITS AMOUNT."

Trans. p. 49.

"The Commission also finds that the Nashville rate is made by all-rail carriers via Cincinnati, and that "their action is uncontrolled by the defendant lines."

Trans. p. 49.

The Commission also finds that THE ACCEPTANCE OF THE RATES SO FIXED BY THE RAIL LINES VIA CINCINNATI WAS THE NECESSARY CONDITION UPON WHICH THE APPELLANT LINES VIA CHATTANOOGA COULD COMPETE FOR NASHVILLE TRAFFIC."

Trans. p. 49.

The Commission also finds that the appellant lines are "UNDER COMPULSION" to meet the rates which rival carriers have established, "OR LEAVE THOSE CARRIERS IN UNDISTURBED POSSESSION OF THE ENTIRE TRAFFIC."

Trans. p. 53.

The Commission also finds that the appellant lines "have no alternative but to accept the measure of compensation dictated by independent rivals, OR ABANDON THE LARGE PERCENTAGE OF NASHVILLE BUSINESS, WHICH THEY NOW SECURE."

Trans. p. 53.

XXVI.

The Commission Erroneously Held that the Appellants Had no right to Consider the Competition at Nashville; Because the Competing Carriers Were All Subject to the Act to Regulate Commerce.

The Commission in its Report and Opinion says:

"In other words, the real competitors of the defendants for this transportation are the all-rail carriers reaching Nashville by way of Cincinnati, AND THOSE CARRIERS ARE CONFESSEDLY AMENABLE TO THE ACT TO REGULATE COMMERCE. If these views are correct, they control, prima facie at least, the determination of this case, for the primary question involved has been recently decided by the Commission."

Trans. p. 52.

"In a series of proceedings instituted by the Georgia Railroad Commission we have taken occasion to review with much care the fourth section of the statute, familiarly known as 'the long and short haul clause,' and have given it a construction intended to have general application."

"*Ga. R. R. Com. vs. Clyde Steamship Company et al.*, 4 Inters. Com. Rep., 120; 5 I. C. C. Rep., 324."

"The consideration which this feature of the law received in the cases here referred to, and the reasons advanced for the conclusions therein announced, will appear from an examination of the Report of the Commission in those cases, made public a few weeks ago, and need not be repeated in this opinion. The proposition which distinctly applies to the present proceeding was stated with conciseness in the following language:

'The carrier has the right to judge in the first instance whether it is justified in making the greater charge for the shorter distance under the fourth section in all cases where the circumstances and conditions arise wholly upon its own line or

through competition for the same traffic with carriers NOT SUBJECT TO REGULATION UNDER THE ACT TO REGULATE COMMERCE. IN OTHER cases under the fourth section, the circumstances and conditions are not presumptively dissimilar and *carriers must not charge less for the longer distance* EXCEPT UPON THE ORDER OF THIS COMMISSION.'

"This ruling is directly in point and conclusive upon the primary issue in this controversy, because the competitors of these defendants for the Nashville traffic in question ARE THEMSELVES INTERSTATE CARRIERS BY RAIL, AND SUBJECT, IN ALL RESPECTS, TO THE ACT TO REGULATE COMMERCE. It follows, therefore, that the carriers herein complained of which engage in the transportation of freight from the Eastern Seaboard to Nashville *through Chattanooga*, and publish and accept rates therefor which are lower than the rates maintained by them for like transportation to Chattanooga—a shorter haul included in the longer haul to Nashville—are acting in plain violation of the fourth section, and that the resulting discrimination against Chattanooga must be adjudged unlawful.

"Upon the facts ascertained in this case, and the interpretation of the statute to which we adhere, any other conclusion would be quite inconsistent. The construction placed upon the long and short haul clause in the Georgia cases was deliberately adopted, and its controlling application to the present controversy is not open to serious question. We must hold that the lower rates accorded by the defendants on shipments to Nashville are without warrant of law, and that the higher charges exacted on shipments to Chattanooga cannot be sanctioned in this proceeding."

Trans. pp. 52, 53.

The Commission was quite right in saying that upon the facts as ascertained by it in this case, and upon the interpretation of the statute to which it adhered, any other conclusion would have been "quite inconsistent."

The Commission was also quite right in stating that the construction which it placed upon the long and short haul clause in

the Georgia cases, and which construction it applied to this case, was "deliberately adopted."

And if that construction had been correct, the Commission would also have been quite right in saying that "its controlling application to the present controversy is not open to serious question;" provided, the facts as found by the Commission were correct.

The first opinion delivered by the Commission upon this subject was *in re* Southern Railway & Steamship Association (sometimes cited as *in re* Louisville & Nashville R. R. Co.) 1 Interstate Commerce Rep., pp. 278–291, in which it was held by the Commission, speaking through Judge Cooley, "that the existence of actual competition, which is of controlling force in respect to traffic important in amount, may make out the dissimilar circumstances and conditions entitling the carrier to charge less for the longer than for the shorter haul over the same line in the same direction, the shorter being included in the longer, in the following cases:

1. When the competition is with carriers by *water*, which are not subject to the provisions of the statute;

2. When the competition is with *foreign or other railroads* which are *not subject to the provisions of the statute;*

3. In *rare and peculiar cases* of competition between railroads *which are subject to the statute*, when a strict application of the general rule of the statute would be destructive of legitimate competition."

See 1 Interstate Commerce Rep., p. 291, left col.

The case just referred to was decided June 15, 1887, a few months after the Act to Regulate Commerce was passed.

The rule as laid down in that case was adhered to by the Commission so long as Judge Cooley remained a member of it. But on November 1, 1892, the personnel of the Commission having changed, it overruled so much of Judge Cooley's decision as held that carriers were permitted to judge for themselves in the first instance as to what constitutes "rare and

peculiar cases of competition between railroads *which are subject to the statute*, when a strict application of the general rule of the statute would be destructive of legitimate competition." And the Commission, speaking through Mr. Commissioner Veazey, held that "the competition of carriers *subject to the Act to Regulate Commerce*, does not create circumstances and conditions which the carriers can take into account in determining for themselves in the first instance whether they are justified under the fourth section in charging more for shorter than for longer distances over their lines."

See L. N. Trammell et al. vs. Clyde S. S. Co. et al. (sometimes cited as the Georgia R. R. Commission vs. Clyde S. S. Co. et al.) 4 Interstate Commerce Rep., p. 121, Head Note No. 6.

The rule as laid down by the Commission in the case last referred to was adhered to by it ever afterward, until the decision by this Court in the case of the Interstate Commerce Commission vs. Alabama Midland Ry. Co. et al. The case of Ga. R. R. Com. vs. Clyde Steamship Co. et al. was cited and relied upon by the Commission as absolutely "*controlling*" in the present controversy.

Trans. p. 52.

In the case of Brewer & Hanleiter vs. L. & N. R. R. Co. et al., 7 Interstate Commerce Rep., p. 237, decided June 29, 1897, the Commission cite said case of Ga. R. R. Com. vs. Clyde S. S. Co. et al., and reaffirm it, as holding "that competition between railroads *subject to the Act*" can "NEVER *make out a case of dissimilar circumstances and conditions within the meaning of the statute.*"

In other words, the Commission, from the time said case of Ga. R. R. Com. vs. Clyde S.S. Co. was decided, until the Alabama Midland Railway case was decided by this Court, uniformly, consistently, and persistently, held "that competition between railroads *subject to the Act*" can "NEVER *make out a case of dissimilar circumstances and conditions within the meaning of the statute :*" even though the competition may be actual; of controlling force; and in respect to traffic important in amount. The Commission de-

liberately enforced that doctrine, in this case, in its strictest literality, and to the fullest extent.

It was with reference to that very doctrine that this court in said case of the Interstate Commerce Commission vs. Alabama Midland Railway Co. used the following language:

"It is further contended on behalf of the appellant that the court below erred in holding, in effect, that competition of carrier with carrier, *both subject to the Act to Regulate Commerce*, will justify a departure from the rule of the fourth section of the Act, without authority from the Interstate Commerce Commission, under the proviso to that section."

168 U. S., p. 167.

"In view of the conclusion hereinbefore reached, the proposition comes to this: That when circumstances and conditions are substantially dissimilar the railway companies can only avail themselves of such a situation by an application to the Commission." . . .

168 U. S., p. 167.

"We are unable to suppose that Congress intended by the fourth section and the proviso thereto to forbid common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the Commission shall authorize them to do so." . . .

168 U. S., p. 169.

"Upon these conclusions, that competition between rival routes is one of the matters which may lawfully be considered in making rates, and that substantial dissimilarity of circumstances and conditions may justify common carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line, we are brought to consider whether upon the evidence in the present case the courts below erred in dismissing the Interstate Commerce Commission's complaint."

168 U. S., p. 170.

See also L. & N. R. R. vs. Behlmer, decided by this court at the present term.

The error of the Commission in this case cannot be more clearly or forcibly stated than by a simple contrast between the doctrine held by the Commission and the doctrine held by this Court.

The doctrine held by the Commission as stated in Brewer & Hanleiter vs. L. & N. R. R. Co., et al., referred to above, and which is one of the recent decisions of the Commission upon the subject, is "that competition between *railroads subject to the Act*" can "NEVER *make out a case of dissimilar circumstances and conditions within the meaning of the statute.*"

7 Interstate Commerce Rep., p. 237.

The doctrine held by this Court, as announced in the Alabama Midland Railway case, is that competition between railroads, *though they be subject to the Act, may make out a case of dissimilar circumstances and conditions within the meaning of the statute, if the competition be such as "affects rates."*

168 U. S., p. 144, et seq.

L. & N. R. R. Co., vs. Behlmer, MS. Op., Oct. Term, 1899.

If this Court is right, the Commission's decision in this case is erroneous; and its order, so far as the fourth section is concerned, is unlawful.

The Commission, in its Eleventh Annual Report, in commenting upon the decision of this Court in the Alabama Midland case, says:

"The defendants (i. e., in the Alabama Midland case) insisted that the fact of *railway competition* at Montgomery made the circumstances and conditions at Troy and at Montgomery dissimilar, and that, therefore, the inhibition of the fourth section did not apply. The Commission had held in many previous cases, and held in this case (i. e., the Alabama Midland case), that *railway competition between carriers subject to the provisions of the Act* could not of itself create the necessary dissimilarity in circumstances and conditions. This contention is not sustained by the Supreme Court, which holds that such competition does

create that dissimilarity, and that the higher rate to Troy is not prohibited by the fourth section."

The italics are mine.

11 Ann. Rep., I. C. C. (1897), p. 38.

Again, the Commission says:

"That section (i. e., the fourth) enacts that the carrier shall not charge more for the short than for the long haul under substantially similar circumstances and conditions. If the circumstances and conditions are similar, the greater charge cannot be made. If the circumstances and conditions are not similar, the section does not apply. The Court holds (i. e., in the Alabama Midland case) that *railway competition* of controlling force makes the circumstances dissimilar. If, therefore, we find in a particular case that competition of controlling force actually exists, that ends the matter. We have no power to say whether, nor to what extent, such competition justifies the higher rate to the intermediate point."

11 Ann. Rep. I. C. C. (1897), p. 43.

Again, the Commission says:

"On November 8, 1897, the Supreme Court held, in the case entitled Interstate Commerce Commission vs. Alabama Midland Ry. et al. (the Troy case, 168 U. S., ——) that *railroad competition* may create discriminating (dissimilar?) circumstances and conditions under the fourth section and thereby justify greater charges for the shorter haul."

11 Ann. Rep., I. C. C. (1897), p. 91.

In the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co. et al., decided December 31, 1897, the Commission, in speaking of the defense relied upon in certain instances in that case, says:

"In all other instances the justification relied upon is the existence of railway competition between carriers subject to the Act to Regulate Commerce. The Commission has uniformly held, up to the present time, that this species of competition does not create the necessary dissimilarity of circumstances and con-

ditions under that section, and such would have been its decision in this case upon the law as it was supposed to be when the findings of fact were prepared. Since then, however, the Supreme Court of the United States by its decision in the case, *Interstate Commerce Commission vs. Alabama M. R. Co.*, decided November 8, 1897, 168 U. S., 144, 42 L. Ed. ——, has determined that this view of the law is erroneous, and that railway competition may create such dissimilar circumstances and conditions as exempt the carrier from an observance of the long and short haul provision. Under this interpretation of the law as applied to the facts found in this case, we are of the opinion that the charging of the higher rate to the intermediate points, as set forth, is not obnoxious to the fourth section. The section declares that the carrier shall not make the higher charge to the nearer point under 'substantially similar circumstances and conditions.' If the conditions and circumstances are not substantially similar, then the section does not apply and the carrier is not bound to regard it in the making of its tariffs. The Court has decided that railway competition, if it exists, must be considered. If, therefore, such competition does actually control the rate at the more distant point, that rate is not made under the same circumstances and conditions as is the rate at the intermediate point and the higher rate is not prohibited by the fourth section."

7 I. C. Rep., pp. 479, 480, Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co. et al.

It will be seen that the Commission expressly concedes that the doctrine announced by it to the effect that the competition of carriers *subject to the Act to Regulate Commerce* does not create circumstances and conditions which the carriers can take into account, has been overruled by this Court in the Alabama Midland Railway case.

XXVII.

Judge Severens' Error in Holding That the Fourth Section of the Act to Regulate Commerce May Apply, Notwithstanding There May be a Substantial Dissimilarity of Conditions.

In the case at bar, Judge Severens, referring to the decision of the Commission in said case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co. et al., says that the Commission, "evidently disheartened by the adverse ruling of the Supreme Court in recent cases," . . . "seems to give up section 4 as of no force or effect in any case where the conditions are not 'substantially similar.'"

Trans. p. 378.

The Judge, after referring to the language quoted by me in the last preceding section of this argument from the decision of the Commission in that case, says:

"Now, I do not understand that such a conclusion follows from that decision (i. e. the decision of the Supreme Court in the Alabama Midland case). On the contrary, I suppose that when a violation of the long and short haul provision is charged, competition is one of the elements which enter into the determination, whether the conditions are similar, and if dissimilarity is found, *then the further question arises whether the dissimilarity is so great as to justify the discrimination which is complained of.* . . . In other words, my opinion is that the restraint of *section* 4 is to be applied upon *the scale of comparison between the dissimilarity of conditions and the disparity of rates*, and that it is competent *under that section* to restrain the exaction of the greater charge for the shorter haul, *although there may be a substantial dissimilarity of conditions*, provided the dissimilarity is not so great as to justify the discrimination made."

Trans. p. 379.

I respectfully submit that there is manifest error in Judge Severens' construction of the fourth section. It is a construction

which has never been given to that section by any other court; nor by the Commission in any of its decisions. The material part of section 4 is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance."

In Re Southern Ry. & S. S. Association (sometimes cited as *In Re* L. & N. R. R. Co.) 1 I. C. Rep., p. 280, Judge Cooley, in speaking of the effect of the introduction into the fourth section of the phrase "under substantially similar circumstances and conditions," said:

"Here we have clearly stated what is unlawful and forbidden; and for doing the unlawful and forbidden act penalties are then provided. But that which the Act does not declare unlawful must remain lawful if it were so before; and that which it fails to forbid, the carrier is left at liberty to do without permission of any one. The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden ONLY WHEN BOTH ARE UNDER SUBSTANTIALLY SIMILAR CIRCUMSTANCES AND CONDITIONS; and if, therefore, in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, SINCE IF THE CIRCUMSTANCES AND CONDITIONS OF THE TWO HAULS ARE DISSIMILAR THE STATUTE IS NOT VIOLATED"

The language of Judge Cooley was quoted approvingly by Judge Ross, in the case of I. C. C. vs. A. T. & S. F. R. R. Co., 50 Fed. Rep., pp. 300-301; and see Behlmer vs. L. & N. R. R. Co., 71 Fed. Rep., p. 839; Brewer & Hanleiter vs. Central of Georgia Railway Co., 84 Fed. Rep. No. 2, p. 261; I. C. C. vs. Alabama Midland Ry. Co., and 168 U. S., p. 168.

Judge Severens is right in saying that the Commission "seems to give up section 4 as of no force or effect in any case *where the*

conditions are not substantially similar;" but he is mistaken in supposing that the Commission's yielding of its position was due to the Commission being "disheartened by the adverse ruling of the Supreme Court in recent cases." It will be seen that *In Re* Southern Ry. & S. S. Association referred to above, and which was one of the very first cases decided by the Commission, the Commission, speaking through Judge Cooley, gave "up section 4 as of no force or effect in any case *where the conditions are not substantially similar*."

His language in that case was that "if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated."

The construction of the fourth section, suggested for the first time by Judge Severens, would, if sound, require an amendment of the fourth section such as is indicated by capitals in the following paragraph:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; AND EVEN WHERE THE CIRCUMSTANCES AND CONDITIONS ARE SUBSTANTIALLY DISSIMILAR, SUCH DISSIMILARITY MUST BE IN DUE PROPORTION TO THE EXISTING DISPARITY IN RATES."

His Honor's construction is:

"That the restraint of *section four* is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates;" (Trans. p. 379) and it is impossible to put that construction upon the fourth section, unless, by judicial legislation, the Court adds to the language of that section some such provision as is indicated by capitals in the preceding paragraph.

In the recent case of the United States vs. Trans-Missouri Freight Association, this Court refused to read into the Anti-

Trust Act an exception or provision which altered the natural meaning of the language used, and that too upon a material point.

166 U. S. 329.

The construction which Judge Severens proposes to put upon the fourth section is new, but it is not useful; because, if the disparity in rates between the shorter and longer distance points be such as to constitute an undue preference in favor of the latter, or an undue prejudice against the former, relief can be given under the third section of the Act. If, however, the disparity does not constitute any undue preference in favor of the longer distance point, nor any undue prejudice against the shorter distance point, it does no harm to anyone; and it ought not to be prohibited, as it is proposed to do, by the judicial amendment suggested by Judge Severens.

The Commission, in its Eleventh Annual Report, commenting upon the decision of the Supreme Court in the Alabama Midland case upon the fourth section, says:

"If the circumstances and conditions are similar, the greater charge cannot be made. IF THE CIRCUMSTANCES AND CONDITIONS ARE NOT SIMILAR, THE SECTION DOES NOT APPLY. The Court holds that railway competition of controlling force makes the circumstances dissimilar. IF, THEREFORE, WE FIND, IN A PARTICULAR CASE, THAT COMPETITION OF CONTROLLING FORCE ACTUALLY EXISTS, THAT ENDS THE MATTER. WE HAVE NO POWER TO SAY WHETHER, NOR TO WHAT EXTENT, SUCH COMPETITION JUSTIFIES THE HIGHER RATE TO THE INTERMEDIATE POINT."

"THE THIRD SECTION IS STILL LEFT, AND UNDER THAT SECTION WE MAY INQUIRE WHETHER, UNDER ALL THE CIRCUMSTANCES, THE RATES AS ADJUSTED GIVE AN UNDUE PREFERENCE TO THE COMPETITIVE POINT, but the fourth section is, by this decision, eliminated from the Act."

11 Ann. Rep., I. C. C. (1897), p. 43.

The Commission is wholly mistaken in supposing that the fourth section is eliminated from the Act by the decision of this Court in the Alabama Midland Ry. case. If the circumstances and

conditions are substantially similar, then under the fourth section the carrier is prohibited from charging more for the short than the long haul, *whether the disparity in rates does or does not give an undue preference to the longer distance point.* If, however, the circumstances and conditions are substantially dissimilar, while the fourth section can have no operation, the third section remains operative, and under that section the Court can decide whether the disparity in rates constitutes an undue preference in favor of the longer distance point, or an undue prejudice against the shorter distance point.

In the case of the Savannah Bureau of Freight & Transportation vs. the Charleston & Savannah Ry. Co., the Commission, again commenting upon the decision of the Supreme Court in the Alabama Midland case, upon the fourth section, says:

"The section declares that the carrier shall not make the higher charge to the nearer point under 'substantially similar circumstances and conditions.' IF THE CONDITIONS AND CIRCUMSTANCES ARE NOT SUBSTANTIALLY SIMILAR, THEN THE SECTION (i. e. THE FOURTH) DOES NOT APPLY, and the carrier is not bound to regard it in the making of its tariff. The Court has decided that railway competition, if it exists, must be considered. If, therefore, such competition does actually control the rate at the more distant point, that rate is not made under the same circumstances and conditions as is the rate to the intermediate point, and the higher rate is not prohibited by the *fourth* section." . .

"WHETHER THOSE RATES ARE IN VIOLATION OF THE THIRD SECTION, IN THAT THEY GIVE AN UNDUE PREFERENCE TO THE MORE DISTANT POINT, IS A DIFFERENT QUESTION, WHICH MIGHT ARISE IN CASES OF THIS KIND."

7 I. C. Rep. pp. 479, 480, Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co. et al.

In all cases where a greater charge is made for a shorter than for a longer haul, the whole question can, according to Judge Severens, be settled under the fourth section; and the third section, under his construction, is, in such cases, of no value whatever.

But, according to the construction which the Commission puts upon the decision of this Court in the Alabama Midland case, and which construction, *in that respect*, is, I think, the correct one, IF THE CIRCUMSTANCES AND CONDITIONS ARE SUBSTANTIALLY DISSIMILAR, THE FOURTH SECTION DOES NOT APPPLY; BUT THE THIRD SECTION REMAINS, AND UNDER THAT SECTION IT MAY BE DETERMINED WHETHER THE DISPARITY IN RATES CONSTITUTES AN UNDUE PREFERENCE OF THE LONGER DISTANCE POINT.

Judge Severens is mistaken in supposing that the Commission is "disheartened by defeat;" or that its comments upon the decision of this Court are the mere exclamations of a panic-stricken fugitive. On the contrary, the Commission, with a clear conception of what this Court has decided in reference to the fourth section, has fallen back upon the third and first sections of the Act, and the opinion of the Commission in the recent case of Calloway vs. L. & N. R. R. Co. et al., 7 I. C. Rep., p. 431, unmistakably indicates that the Commission intends to use the third and first sections in the future, in all cases of a greater charge for a shorter distance, where the circumstances and conditions are substantially dissimilar; and where, for that reason, the fourth section has no application.

It may be argued by counsel for appellee that Judge Severens' construction of the fourth section finds some support in the following language used by this Court in the Alabama Midland Ry. case:

"In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration, in determining the question of 'undue or unreasonable preference or advantage,' or 'what are substantially similar circumstances and conditions.' The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such

cases, there is no absolute rule which prevents the Commission or the Courts from taking that matter into consideration."

168 U. S., p. 167.

Surely nothing can be found in the language just quoted to sustain Judge Severens in his proposition, that *though the circumstances and conditions may be substantially dissimilar, the "restraint of section four is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates."*

This Court, in saying that "we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections," did not intend to intimate that either section contains any such restraint as that the rates must be "upon the scale of comparison between the dissimilarity of conditions and the disparity of rates." The only restraint contained in the fourth section is that the carrier shall not charge more for a shorter than for a longer haul under substantially similar circumstances and conditions; and this Court, in saying that the mere fact of competition, no matter what its character or extent, does not necessarily relieve the carrier from the restraint of the fourth section, means that competition which is fictitious, or ineffective, or in which the public has no interest, shall not be taken into consideration at all, as a circumstance or condition affecting transportation. If, however, the competition be genuine and effective, and if it subserves the public interest as well as that of the carrier, it may be taken into consideration; and in such a case, it will relieve the carrier from the restraint of the fourth section, i. e., from charging more for a shorter than for a longer haul. But the restraint of the third section remains, and if the disparity in rates constitutes an *undue* preference of the longer distance point, the rates may be declared unlawful under the restraint of that section, notwithstanding they may not offend against the restraint of the fourth section at all.

Judge Severens seems to doubt the soundness of his own construction of the fourth section, and to concede that it may become necessary to fall back upon the third section. His language is:

"But the long and short haul clause is only one of the specific provisions employed for the general purpose of the Act. The third section underlies the fourth and supplies the principles on which it rests; so that if the literal construction referred to be put upon the fourth section, the case would still be exposed to the third section, which forbids undue preference to one locality or the subjection of another to any undue disadvantage."

Trans. p. 379.

The only error in the language just quoted consists in the proposition that "the third section underlies the fourth and supplies the principles on which it rests."

Trans. p. 452.

The third section does *not* underlie the fourth. The third section covers ground which is entirely distinct from that which is covered by the fourth section. The *third* section does not prohibit *any* preference *unless it is undue or unreasonable*; while the *fourth* section prohibits a greater charge for the shorter than for the longer distance, if the circumstances and conditions be substantially similar, *whether such disparity of rates does, or does not, constitute an undue or unreasonable preference of the longer distance point.*

XXVIII.

Judge Severens' Error in Supposing That This Court Held That the Rigor of the Fourth Section Can be Moderated.

In the case at bar, Judge Severens uses this language:

"Conceding that some allowance should be made for the conditions at Nashville, the rigor of the rule of the long and short haul clause of the fourth section, moderated to some extent, *as it was held might be done in the case of the Commission vs. The Alabama Midland Railway Company*, 168 U. S., 144, the disproportion in the present case is too gross."

The italics are mine.

Trans. p. 373.

I respectfully deny that it was held, or even intimated, by

this Court in the Alabama Midland Ry. case, that "the rigor of the rule of the long and short haul clause of the fourth section" could be "moderated to some extent," or to any extent.

The case was decided upon the ground that the long and short haul clause of the fourth section *did not apply at all*; and not upon the ground that "the rigor" of that clause had been properly, or improperly, "moderated." If the circumstances and conditions are substantially similar, and a greater charge is made for a shorter than for a longer distance, etc., no court has the power to "moderate" the rigor of the fourth section to the slightest extent. If, in such a case, the charge to the shorter distance point exceeds the charge to the longer distance point, even to the extent of a mill, such charge is absolutely prohibited by the fourth section; and no power is vested in any court to moderate the rigor of the prohibition.

The carrier, upon application to the Commission, may, in special cases, be relieved from the operation of the fourth section; but as no application has been made to the Commission for relief in the case at bar, it is unnecessary to discuss the question whether the Commission would, upon such an application, have the power to moderate the rigor of the fourth section;—or, whether it would be limited to granting or refusing full absolution. But whatever power the Commission might have under a special application for relief, it is certain that in a case where no application for relief has been made to the Commission, no Court has the right to moderate, to any extent whatever, the rigor of the long and short haul clause in any case to which it applies.

XXIX.

Judge Severens' Error as to What was Held by the Lower Courts in the Alabama Midland Railway Case.

In the case at bar Judge Severens, in commenting upon the decision of this Court in the Alabama Midland Ry. case, uses this language:

"*Both the courts below had concurred in holding that the Commission was wrong in thinking the disparity of charges was too great in view of the facts*, and the Supreme Court did not find sufficient reason for reversing their decree."

The italics are mine.

Trans. p. 374.

I respectfully deny that either the Circuit Court, or the Court of Appeals, decided the Alabama Midland case upon the ground that the Commission was wrong "*in thinking the disparity of charges was too great.*" Neither of those courts intimated that "the restraint of section four is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates."

That "scale of comparison" was invented, for the first time, by Judge Severens; and neither the Circuit Court, nor the Court of Appeals, attempted to use it in the Alabama Midland Railway case. Both of those courts decided that case on the ground that the circumstances and conditions were substantially dissimilar, and, therefore, *that the fourth section did not apply at all.* And neither of them attempted to discuss the question as to whether the rigor of that section had been properly, or improperly, "moderated" by the Commission.

See the Opinion of the Circuit Court in the Alabama Midland Ry. case, 69 Fed. Rep., 227 to 233; and the Opinion of the Circuit Court of Appeals in 74 Fed. Rep., 715 to 733.

XXX.

Judge Severens' Error in Supposing that this Court Held that Competition is not to be Regarded as a Controlling Consideration.

In the case at bar, Judge Severens said:

"The Supreme Court in that case (i. e., the Alabama Midland Ry. case), while reaffirming the doctrine that competition

between railway carriers might, and frequently ought, to be considered in adjusting rates under the long and short haul clause, yet took pains to prevent the inference from its opinion that it (competition) should be regarded as a *controlling* consideration."

Trans. p. 374.

I respectfully deny that this Court "took pains to prevent the inference that competition should be regarded as a *controlling* consideration." On the contrary, I insist that the very point decided by this Court in the Alabama Midland Ry. case was that where competition *is such that it can be properly considered* it *is* to be allowed to *control* in the making of rates.

I will hereinafter show that the competition at Nashville, the longer distance point, is "such as, having due regard for the interests of the public and of the carrier, ought justly to have effect upon the rates;" and therefore that it can be properly considered. And I will hereinafter show that if the competition be such as can be properly considered at all, it must, of necessity, be allowed to *control* in fixing rates at competitive points.

There can be no middle course. The Courts must hold either that competition *can* be considered, or that it *cannot* be considered, in fixing competitive rates.

If they hold that it cannot be considered in fixing competitive rates, then the short rail lines and the water lines will have a monopoly of the transportation business of the country. If, on the other hand, the courts adhere to the doctrine decided by this Court in the Alabama Midland Ry. case, that competition, such as affects rates and such as subserves the interests of the public as well as of the carrier, may be considered in fixing competitive rates, then such competition must, of necessity, *control* in the fixing of those rates. All competing lines, however numerous they may be, must accept the lowest rates offered by any one of them, or all but one of them must abandon the competitive traffic altogether.

XXXI.

Judge Severens' Error in Holding that Congress Intended that there Must be Something Unusual and Peculiar in the Competition.

In the case at bar, Judge Severens said:

"As the circumstances vary infinitely and constantly in the course of such business, it would seem that Congress must have intended something unusual and peculiar, out of the ordinary course, not ordinarily incident to the business, as that which would create a substantial dissimilarity; for otherwise, the vast bulk of transportation would not be subject to the rule at all."

Trans. p. 374.

The inference which counsel for appellee may seek to draw from the language just quoted is, that as competition between railroads which are subject to the Act to Regulate Commerce is "ordinarily incident to the business," and therefore not "unusual," or "peculiar," it cannot create a "substantial dissimilarity" within the purview of the fourth section.

If counsel's construction of his Honor's language is correct, his Honor has fallen into the very error for which the Commission was reversed in the Alabama Midland Ry. case.

In the opinion delivered by the Commission in the Alabama Midland Ry. case, it was said:

"No attempt is made to establish substantial dissimilarity of circumstances and conditions at Montgomery on the ground of rail competition further than by proof of the fact that there are a number of railway lines running to and through that city connecting with different parts of the country. This alone, it is scarcely necessary to say, is not sufficient. Re Louisville & Nashville R. R. Co., 1 Inters. Com. Rep., 278, 1 I. C. C. Rep., p. 31."

4 Inters. Com. Rep., p. 35, left col. Board of Trade vs. Alabama Midland R. Co.

It will be noticed that the Commission, in deciding the question of rail competition in the Alabama Midland Ry. case, based its opinion upon its previous decision In Re Louisville & Nashville R. R. Co.

In Re Louisville & Nashville R. R. Co. (sometimes cited as Re Southern Railway & Steamship Association), 1 Inters. Com. Rep. p. 278, it was held by the Commission that where railroads are subject to the Act to Regulate Commerce, competepetition between them could not be considered except in "*rare and peculiar cases.*"

1 Inters. Com. Rep., p. 278, right col., 5th head note, par. (c).

In the Alabama Midland Ry. case, there was no pretense that there was anything "rare," or "peculiar," or "unusual" in the competition between the various railroads which centered at Montgomery. It was conceded that all of said railroads were subject to the Act to Regulate Commerce; and the very question which this Court was asked to decide in that case was whether the competition between those rail lines at Montgomery, all of which were confessedly subject to the Act to Regulate Commerce, could properly be taken into consideration in fixing competitive rates to and from Montgomery.

While there was a question of fact in the Alabama Midland Ry. case as to whether there was any water competition at Montgomery, there was no question of law in that case as to whether water competition could be taken into consideration.

The Commission itself, in one of its earliest cases, had decided that water competition, and competition between rail carriers *not* subject to the Act to Regulate Commerce, could be taken into consideration. It had also decided that competition, even between rail carriers subject to the Act, could be taken into consideration "*in rare and peculiar cases.*".

1 Inters. Com. Rep., p. 278, right col., 5th head note.
In Re Southern Ry. & S. S. Association.

None of those questions, therefore, were raised in the Alabama Midland Ry. case. The question raised in that case was whether competition between rail carriers subject to the Act could be considered, *where there was nothing "rare," "unusual," or "peculiar" in it; and where it was in no wise different from other ordinary rail competition.* I understand this Court to have decided in that case, that if the competition be such as to affect rates, and such as subserves the public interest as well as the interest of competing carriers, it may be taken into consideration, notwithstanding all of the competing rail carriers are subject to the Act to Regulate Commerce, and notwithstanding there be nothing "rare," "unusual," or "peculiar" in the competition.

See also L. & N. R. R. Co., et. al. v. Behlmer, MS. Op. Oct. Term., 1899.

XXXII.

The Contention That Competition Cannot be Considered Except in Extreme Cases.

Counsel for appellee may refer to the fact that at the time the Act to Regulate Commerce was passed, and prior thereto, and since, the greater charge for the shorter than the longer haul, etc., only existed in cases of competition in transportation to the longer distance point; and he may argue that, as Congress knew this fact, it did not intend that competition in transportation should be an excuse in *all* cases, but only in certain *extreme* cases.

I concede that Congress did not intend that competition in transportation should be an excuse "in *all* cases."

I concede that Congress did not intend that competition should be an excuse in any case, except where "the interests of the public as well as of the carrier demand it."

But I contend that where "the interests of the public as well as of the carrier" *do* demand it, Congress *did* intend that competition should be an excuse.

XXXIII.

How the Order Made by the Commission in This Case May be Complied With.

The order of the Commission will be found in Trans. pp. 56, 57. The appellants, or such of them as are, or may be engaged in the transportation of property from New York and other Atlantic Seaboard points to Chattanooga, or through Chattanooga to Nashville, in the State of Tennessee, are severally required to "cease and desist from charging or receiving any greater compensation in the aggregate for the transportation of like kind of property from New York, Boston, Baltimore, or other Atlantic Seaboard cities, for the shorter distance to Chattanooga, than for the longer distance over the same line in the same direction to Nashville.

Trans. p. 57.

If said order should be enforced by the Court as made by the Commission, it is manifest that the appellants might (if they could) comply with it in either one of several ways.

First: They might, if competition at Nashville would permit, increase the rates to Nashville, to the extent of a certain portion of the difference between the present rates to Nashville, and the present rates to Chattanooga; and then reduce the rates to Chattanooga to the extent of the remainder of said difference; or

Second: They might, if competition at Nashville would permit, increase the rates to Nashville, to the full extent of the difference between the present rates to Nashville, and the present rates to Chattanooga; or

Third: They might reduce the rates to Chattanooga to the full extent of the difference between the present rates to Nashville and the present rates to Chattanooga.

If the appellants could effectively carry out either one of

those three plans, they would comply not only fully, but fairly, with the order "as made" by the Commission.

Both the first and the second of said plans would necessitate a *material* increase in the rates to Nashville, or they would be useless.

An increase in the Nashville rates to the extent of—say one-half the difference between the present rates to Nashvilie, and the present rates to Chattanooga, would amount to the following figures, in cents per hundred pounds, viz.:

Classes	1	2	3	4	5	6
	11½	10	13	15½	12	9

Trans. p. 42.

An increase in the Nashville rates to the full extent of the difference between the present rates to Nashville, and the present rates to Chattanooga, would amount to the following figures, in cents per hundred pounds:

Classes	1	2	3	4	5	6
	23	20	26	31	24	18

Trans. p. 42.

It must be remembered that the appellants are railroad companies *whose lines cannot reach Nashville, except through Chattanooga.*

It must also be remembered that the *appellants do not make the rates from the eastern cities to Nashville*; those rates being made by the Trunk Lines from eastern cities to Ohio River points, operating in connection with the Louisville & Nashville Railroad Company, whose lines extend from the Ohio River to Nashville, *but which is not a party to this proceeding, so far as its lines from the Ohio River to Nashville are concerned.*

Upon this point the Commission says:

"Practically, therefore, the Nashville rate, by the several routes now under consideration, is an extension of the Trunk Line rate to that point, the total charge being divided between

the several carriers in nearly exact proportion to the mileage operated by each."

Trans. p. 43.

Again the Commission says:

"The general range of rates in the territory covered by the Southern Railway & Steamship Association (i. e., the territory south of the Potomac and Ohio Rivers and east of the Mississippi River), is materially higher than in the territory of the Trunk Line Association (i. e., the territory north of the Ohio River, between Chicago and New York), the difference resulting mainly *from the much greater volume of traffic in the latter section*;" etc.

Trans. p. 48.

Again the Commission says:

"The Nashville rate is independent of the lines operating through Chattanooga, *and those lines have no voice in determining its amount. That rate is made by the all-rail carriers via Cincinnati*, and their action is uncontrolled by the defendant lines."

Trans. p. 49.

As the Nashville rate "is made by the all-rail carriers via Cincinnati," the only way in which the appellants can secure an effective increase in the Nashville rate is to induce "the all-rail carriers via Cincinnati" to agree to such increase.

The rates from New York to Nashville are divided between the Trunk line roads north of the Ohio River and the Louisville & Nashville Railroad south of that river. The division is as follows:

Classes	1	2	3	4	5	6
The proportions received by the Trunk Lines for transportation from New York to Cincinnati are the following, in cents per hundred pounds,	65	57	44	30	26	22

Trans. p. 42.

The proportions received by the L. & N. R. R. for transportation from Cincinnati to Nashville are, in cents per hundred pounds.....	26	21	16	12	10	9

Trans. p. 43.

Making total rates from New York via Cincinnati to Nashville.....	91	78	60	42	36	31

Trans. p. 42.

If the appellants should ask the Trunk Lines to agree to materially increase the above proportions which they receive out of the Nashville rate for transportation from New York to Cincinnati, the trunk lines would be forced to decline. Because the Trunk Line rates from New York to Cincinnati, as well as the Trunk Line rates from New York to Louisville, Evansville, St. Louis, Columbus, Indianapolis and all other important junctional points in Trunk Line territory, are constructed so as to give each of those points the same proportion of the rates which prevail between New York and Chicago, as the distance of each of those points from New York bears to the distance from Chicago to New York.

See Wholesale Prices, Wages and Transportation, Senate Rep. No. 1394, 2d Sess., 52 Con., Part I, pp. 429, 430.

The Trunk Lines would therefore say to the appellants "we cannot increase our proportions of the Nashville rate received for transportation by us from New York to Cincinnati, *unless we make the same increase in our rates on all traffic shipped from New York destined to stop at Cincinnati; nor unless we also increase, in the same proportion our rates from New York to Louisville, Evansville, St. Louis, Columbus, Indianapolis and all other important junctional points in Trunk Line territory.* Considering the great volume of traffic in Trunk Line territory, it is believed that the Trunk Line rates are already as high as they can be reasonably made; and if we should attempt to increase the Trunk Line rates from New York to Cincinnati, Louisville, Evansville, St. Louis, Columbus, Indianapolis, and all other important junctional

points in Trunk Line territory, innumerable complaints would be made to the Interstate Commerce Commission against us; and the probabilities are that such complaints would be sustained. For these reasons, we must decline to advance the Trunk Line rates from New York to Cincinnati."

The appellants might then apply to the Louisville & Nashville Railroad Company, and ask that company to increase the proportions which it received out of the Nashville rate for transportation from Cincinnati to Nashville; but that company also would be forced to decline. Because the rates from New York to Nashville are now materially higher than are the rates from New York to Cincinnati, Louisville, or Evansville.

Trans. pp. 51, 52.

The Louisville & Nashville Railroad Company would therefore say to the appellants "we cannot increase our proportions of the Nashville rates received for transportation by us from Cincinnati to Nashville, without increasing materially the disparity which already exists as against Nashville in favor of Cincinnati, Louisville and Evansville, in through rates from New York. If we should increase the present disparity, it would prevent Nashville from competing with either Cincinnati, Louisville, or Evansville, in the territory lying between Nashville and the Ohio River; it would prevent Nashville from competing with Memphis in the territory lying between Nashville and the Mississippi River; and it would divert a large amount of traffic from our line to steamboats plying between Evansville and Nashville. For these reasons, we must decline to advance the proportions received by the L. & N. R. R. Co. out of the rates from New York to Nashville."

It is manifest from the foregoing considerations, that it would be utterly impossible for the appellants to induce either the Trunk Line roads or the L. & N. Railroad to agree to any material increase in the rates from New York, via Cincinnati, to Nashville.

It may be said, however, that though the appellants may not be able to induce the Trunk Line roads, or the Louisville & Nashville Railroad, to agree to increase the rates from New York, via Cincinnati, to Nashville, there is nothing to prevent the appellants from increasing their own rates from New York, via Chattanooga, to Nashville, to the extent of one-half, or even to the full extent, of the difference between the present rates to Nashville, and the present rates to Chattanooga.

We have above shown what such increases would amount to in cents per hundred pounds, on the different classes; and it is obvious that if the appellants should charge rates from New York, via Chattanooga, to Nashville, which are that much higher than the rates now charged from New York, via Cincinnati, to Nashville, the appellants could not obtain the carriage of a single pound of traffic from New York, via Chattanooga, to Nashville.

Upon this point the Commission says:

"*The acceptance of the rates so fixed by the rail lines via Cincinnati* was the necessary condition upon which the lines via Chattanooga could compete for Nashville traffic."

Trans. p. 49.

Again the Commission says:

"THESE LINES (i. e., the appellant lines) ARE UNDER COMPULSION, THEREFORE, TO MEET THE RATES WHICH OTHER CARRIERS HAVE ESTABLISHED, or leave those carriers in undisturbed possession of the entire traffic. They have no alternative but to accept the measure of compensation dictated by independent rivals, OR ABANDON THE LARGE PERCENTAGE OF NASHVILLE BUSINESS, WHICH THEY NOW SECURE."

Trans. p. 53.

In other words, unless the appellants can induce the Trunk Line roads and the Louisville & Nashville Railroad to make an increase in their rates, which those roads do not think they would

be justified in making, the appellants must abandon to those roads the large percentage of Nashville business which the appellants now secure.

It is obvious, therefore, that as both the first and second plans suggested above involve an increase in the rates to Nashville, which it is impossible to secure, the appellants are in effect compelled to adopt the third plan, i. e., *to reduce the rates from New York to Chattanooga to the full extent of the difference between the present rates to Nashville and the present rates to Chattanooga.* In other words, instead of the appellants really having an option to adopt either of the three plans mentioned above, they are, *for all practical purposes*, forced to confine themselves to the third plan, or abandon all participation in the Nashville traffic. The entire loss which is to be sustained in making the Chattanooga rates not higher than the Nashville rates is to fall exclusively upon the appellants, whose lines reach Nashville through Chattanooga; and no part of the loss is to fall upon the rival carriers, whose lines reach Nashville through Cincinnati. And this is so, notwithstanding those rival lines are the very lines which are really responsible for the disparity which exists between the present rates to Nashville, and the present rates to Chattanooga. Upon this point the Commission says:

"For these conditions the carriers complained of do not appear *chiefly* responsible, because the lower rate to Nashville is beyond their control."

Trans. p. 53.

The Commission could have said, with equal truth, that the carriers "complained of" are not responsible *at all* for the lower rate to Nashville.

We are thus confronted with the singular proposition, that a court, authorized by the act "to form a *just* judgment," ought to enforce an order of the Commission for a readjustment of rates between two competing cities (i. e., Nashville and Chattanooga), *by punishing the innocent, and allowing the guilty to go scot free.*

For, if either set of lines is guilty of any wrong in creating a disparity between the rates to Chattanooga and the rates to Nashville, those lines operating via Cincinnati are alone guilty.

XXXIV.

The Order Made by the Commission in this Case is Not Lawful Under the Third Section of the Act.

Though the Commission may have erred in basing the order made by it in this case on the fourth section, yet if said order is lawful under the third section (which I deny), the Court has power to enforce it.

Though the circumstances and conditions at Nashville may be substantially dissimilar from those at Chattanooga, and though such dissimilarity may take the case out of the operation of the fourth section, the third section remains; and if it can be shown that the disparity in rates constitutes an *undue* preference of Nashville, the rates may be declared to be unlawful. But before a violation of the third section can be established, it must be shown that the disparity of rates as between Nashville and Chattanooga, however considerable it may be, constitutes not only a preference, but an *undue* preference in favor of the longer distance point.

The third section of the Act to Regulate Commerce was modeled upon the second section of the English Railway & Canal Traffic Act of 1854, and upon Section 11 of the English Railway & Canal Traffic Act of 1873. For the convenience of the Court I print in parallel columns so much of said sections as are material for the present purpose:

UNDUE PREFERENCE CLAUSE.
English Act.

SEC. 2. Railway and Canal Traffic Act, 1854.—1 *Nev. & Mac., p.* 2.

SEC. 11. Railway and Canal Traffic Act, 1873.—1 *Nev. & Mac., p.* 11.

. . . . . And no such company shall make or give any *undue* or *unreasonable* preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any *undue* or *unreasonable* prejudice or disadvantage in any respect whatsoever. —1 *Nev. & Mac., pp.* 2-11.

UNDUE PREFERENCE CLAUSE.
American Act.

SEC. 3. Act to Regulate Commerce.

That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any *undue* or *unreasonable* preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any *undue* or *unreasonable* prejudice or disadvantage in any respect whatsoever.—24 U. S. *Stat. at Large, p.* 380.

XXXV.

ONLY SUCH DISCRIMINATIONS OR PREFERENCES AS ARE UNJUST OR UNREASONABLE ARE PROHIBITED BY THE ACT.

In the case of I. C. C. vs. B. & O. R. R. Co., Mr. Justice Brown, speaking for this Court said:

"It is not all discriminations or preferences that fall within the inhibition of the statute; *only such as are unjust and unreasonable.*" . . . "Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust."

145 U. S., pp. 276, 277, I. C. C. vs. B. & O. R. R.

In the case of I. C. C. vs. Ala. Midland R'y. Co., Judge Bruce said:

"The words 'any undue or unreasonable preference or advantage' plainly imply that every preference or advantage is not condemned, *but such, only, as are undue or unreasonable.*

69 Fed Rep., pp. 231, 232.

In the case of the Commercial Club of Omaha vs. Chicago & N. R. Co., decided November 18, 1897, the Commission, speaking through Commissioner Knapp, said:

"It must be remembered that not every inequality in rates constitutes a violation of the law. *Discrimination is forbidden only when it is unjust. Preferences and prejudices are not prohibited unless they are undue.* The language of the statute implies that there may be discriminations which are not unjust and preferences which are not undue."

7 I. C. Rep., p. 404.

It goes without saying that where lower rates are charged to one city than to another, and those cities are competitors in a common territory, such disparity of rates constitutes a preference in favor of the one, and a prejudice or discrimination as against the other.

But the question still remains whether the preference, or prejudice, or discrimination is *undue or unjust?*

DIAGRAM NO. 5.

In the above diagram, No. 5, suppose A–C to represent a railroad owned by one company, and A–B to represent a railroad owned by a different company. Suppose B and C are cities which compete in the territory which lies between them. If the company owning the railroad A–C puts in a line of rates on traffic from A to C materially lower than the company owning the other railroad charges on traffic from A to B, such a disparity

of rates will constitute a preference in favor of C and a prejudice or discrimination against B; because it will enable C to compete at an advantage over B in the territory which lies between them. But such preference, or prejudice or discrimination is not *undue* or *unjust*. Merchants at B would have no ground of complaint against the line A–C; because it carries no traffic to or from B.

4 I. C. Rep., p. 65, Eau Claire Board of Trade vs. C. M. & St. P. Ry. et al., 4th head note.

Nor would merchants at B have any ground of complaint against the line A–B, because the reduction in rates on traffic from A to C, which alone created the disparity of rates, was not made by the line A–B, but by the line A–C, over which the line A–B has no control. Even if the same company owned both lines, the mere fact that it made a material reduction in the rates on traffic from A to C would not of itself establish the fact that the preference in favor of C was *undue*, or that the prejudice or discrimination against B was *unjust*. The competition existing at C might compel the company to accept on traffic from A to C rates much lower than it otherwise might reasonably charge.

XXXVI.

Neither the Preference in Favor of Nashville and Memphis, nor the Prejudice or Discrimination Against Chattanooga, is Unjust or Unreasonable.

The Commission finds and reports that the Nashville rate "is made by the all-rail carriers via Cincinnati;" and that "their action is uncontrolled by the defendant lines," which reach Nashville, through Chattanooga.

Trans. p. 49.

The Commission finds and reports that "the Nashville rate is independent of the lines operating through Chattanooga;" and that those lines "have no voice in determining its amount."

Trans. p. 49.

On the other hand, the Commission finds and reports that the Chattanooga rates, both "rail and water," and "all-rail," are "established by the Southern Railway & Steamship Association;" which was an association entirely distinct from the Trunk Line Association, which makes the rates from New York and other North Atlantic ports to Cincinnati and other Ohio River points.

Trans. p. 48.

We therefore have one of the cases illustrated by Diagram No. 5, in Section XXXV. of this argument. The *real* complaint of Chattanooga is not that the rates charged by the appellant lines to that city are too high, in and of themselves; but that they are too high as compared with rates which the Trunk Lines, in connection with the Louisville & Nashville Railroad, charge to Nashville, and to Memphis, respectively. Neither the Trunk Lines, nor the Louisville & Nashville Railroad, reach Chattanooga; and, therefore, Chattanooga merchants have no right to complain against those lines, because of the low rates which they see proper to charge to points which they do reach.

4 I. C. Rep., p. 65, Eau Claire Board of Trade vs. C. M. & St. P. Ry., et al., 4th head note.

The Commission finds and reports that the Nashville rate "is an extension of the Trunk Line rate to that point, the total charge being divided between the several carriers in nearly exact proportion to the mileage operated by each."

Trans. p. 43.

The Commission also finds and reports "that the Memphis through rate, like the Nashville through rate, is, in effect, an extension of the Trunk Line rate to Memphis, the total charge being divided between the different carriers in proportion to their respective mileage."

Trans. p. 44.

The Commission also finds and reports "that the general range of rates in the territory covered by the Southern Railway

& Steamship Association is materially higher than in the territory of the Trunk Line Association, the difference resulting mainly *from the much greater volume of traffic in the latter section.*"

Trans. p. 48.

The preference which exists in favor of Nashville and Memphis is due alone to the fact that the general range of rates in the territory of the Trunk Line Association is materially lower than the general range of rates in the territory of the Southern Railway & Steamship Association.

The Commission finds and reports that the distance from New York, via Bristol and Chattanooga, to Nashville, is 1052 miles (Trans. p. 46); and that the distance from New York, via Cincinnati, to Nashville, is also 1052 miles.

Trans. p. 45.

As the distance from New York to Nashville, via the Bristol and Chattanooga route, is precisely the same as the distance from New York to Nashville, via the Cincinnati route, it is manifest that if the general range of rates in the territory of the Trunk Line Association were the same as the general range of rates in the territory of the Southern Railway & Steamship Association, Nashville would get the same rates from New York whether the shipments came via Cincinnati, or via Bristol and Chattanooga. And it is also manifest that Chattanooga would, in that case, get lower rates than Nashville from New York; because the distance from New York to Chattanooga is 151 miles less than the distance from New York to Nashville.

The Commission finds and reports that the Trunk Line rate per ton per mile (on first-class freight) is $1\frac{7}{10}$ cents (Trans. p. 43); whereas the Southern Railway & Steamship Association rate per ton per mile (on first-class freight) is $2\frac{4}{10}$ cents.

(NOTE.—The rate on first-class freight from New York to Chattanooga, a distance of 901 miles (Trans. p. 46), is $1.14 per hundred pounds (Trans. p. 42); which is equivalent to, say $2\frac{4}{10}$ cents per ton per mile.)

It will be seen, therefore, that the Trunk Line rate is to the Southern rate as $1\frac{7}{10}$ is to $2\frac{7}{10}$; or, for all practical purposes, it is as 2 is to 3. As the Trunk Line rate is so much less per ton per mile than the Southern rate, it is easy to see why it is that the total rate from New York to Nashville, or to Memphis, may be less than the total rate from New York to Chattanooga; notwithstanding Nashville and Memphis may be more distant than Chattanooga from New York.

Great stress is placed upon the fact, as found and reported by the Commission, to the effect that, in many instances "under the tariffs now in force, goods may be carried from the East through Chattanooga to Nashville, and back through Chattanooga to points South and East, and there sold at lower prices than Chattanooga merchants can sell for.

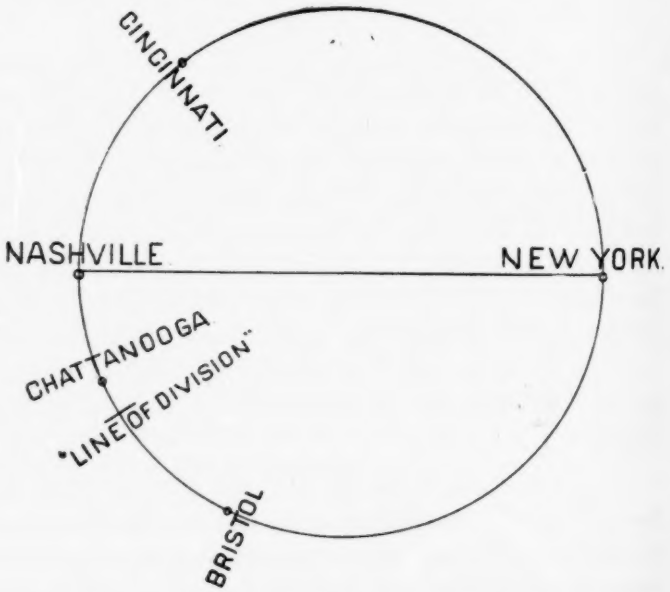
Trans. p. 47.

The fact is due alone to the difference between the Trunk Line rates and the Southern rates. The Trunk Line rates per ton per mile from New York, via Cincinnati to Nashville, are such that in a few instances (though not in many as reported by the Commission), shipments of certain articles may be made from New York, via Cincinnati, to Nashville, at such rates, as that the shippers can afford to pay the local rates of the Nashville, Chattanooga & St. Louis Railway from Nashville to Chattanooga, and to a few points south and east of Chattanooga and their total rates will be somewhat less than the Southern rates per ton per mile make the total rates from New York direct to Chattanooga.

As such rates can be obtained from New York via the Trunk Lines to Nashville, on shipments made via Cincinnati, the appellant lines operating through Chattanooga meet the Trunk Line rates to Nashville; and, therefore, in a few instances, shipments may be made from New York *through Chattanooga* to Nashville, and back to Chattanooga at less total rates than are charged from New York to Chattanooga direct. *But the reason why such shipments can be made is precisely the same when they pass through*

Chattanooga, as when they pass through Cincinnati; viz., *that the Trunk Line rates are less per ton per mile than the Southern rates.*

As stated above, the distance from New York, via Cincinnati, to Nashville, is exactly the same as the distance from New York, via Bristol and Chattanooga, to Nashville, viz., 1,052 miles. If, therefore, we draw a circle 2,104 miles in circumference, with New York and Nashville as points on the circumference, and draw a straight line from New York to Nashville, said line will divide said circle into halves. We have drawn such a circle on a scale of $5\frac{5}{16}$ miles to the degree, and by that scale we have located Cincinnati, Nashville, Bristol and Chattanooga, according to their respective distances from New York. Said circle is shown on Diagram No. 6:



The distances from New York to Cincinnati, Nashville, Bristol and Chattanooga, respectively, are as found and reported by the Commission.

Trans. pp. 45, 46.

If a New York merchant, B, should ship a ton of first-class freight over the northern half of said circle, via Cincinnati, he would, upon payment of $21.46, as freight, be entitled to 1,255 miles of transportation; and the terminus of said 1,255 miles is indicated on the circumference of said circle by the point marked "Line of Division." It will be noticed that his shipment would pass from New York through Cincinnati; through Nashville; through Chattanooga; and to a point 52 miles south of Chattanooga.

On the other hand, if a New York merchant, C, should ship a ton of first-class freight over the southern half of said circle, via Bristol, he would, upon the payment of $21.46, as freight, be entitled to only 849 miles of transportation; and the terminus of said 849 miles is indicated on the circumference of said circle by the same point that is marked "Line of Division." In other words, C's shipment would not reach Chattanooga at all. On the contrary, it would meet B's shipment at said point marked "Line of Division," which is 52 miles south of Chattanooga. The only reason why B would be entitled to 1,255 miles of transportation, as against the 849 miles to which C would be entitled, is, that the Trunk Line rates are less per ton per mile than the Southern rates. We can readily see from said diagram why it is that shipments may be made from New York to Nashville, and thence to Chattanooga, and even to said point marked "Line of Division," which is 52 miles south of Chattanooga, for less money than is charged by the Southern lines from New York direct to Chattanooga. We can also appreciate the statement made by the Commission that "it is inevitable that difficulties should exist and complaints arise *along the line of division* between varying systems of classification and unlike methods of tariff construction."

Trans. p. 48.

XXXVII.

Southern Rates Must, of Necessity, Be Higher per Ton per Mile than Trunk Line Rates.

The Commission finds and reports that the difference between the general range of Southern rates and the general range of Trunk Line rates results mainly "from the much greater volume of traffic" in the Trunk Line territory.

Trans. p. 48.

Mr. Knox testifies that the difference between the Southern rates and Trunk Line rates "is due to the enormously greater volume of business, and the very much larger population" in the Trunk Line territory than in the Southeastern territory; and that if the Southeastern roads were to undertake to make their rates the same per ton per mile as the roads north of the Ohio, including the Trunk Lines, none of the Southern roads, with their limited volume of tonnage and population, could make expenses."

Trans. pp. 210, 211.

The Interstate Commerce Commission, for statistical purposes, has divided the United States into ten territorial groups. The Trunk Line territory (i. e., the territory between Chicago and New York) comprises groups II. and III.; and the Southern territory (i. e., West Virginia, Virginia, North Carolina, South Carolina, Kentucky, Tennessee, Mississippi, Alabama, Georgia and Florida) comprises groups IV. and V., as designated by the Commission.

See Statistics of Railways (1894) Frontispiece.

The Statistician of the Commission has published a number of diagrams to illustrate certain comparisons between the railroads in the various groups.

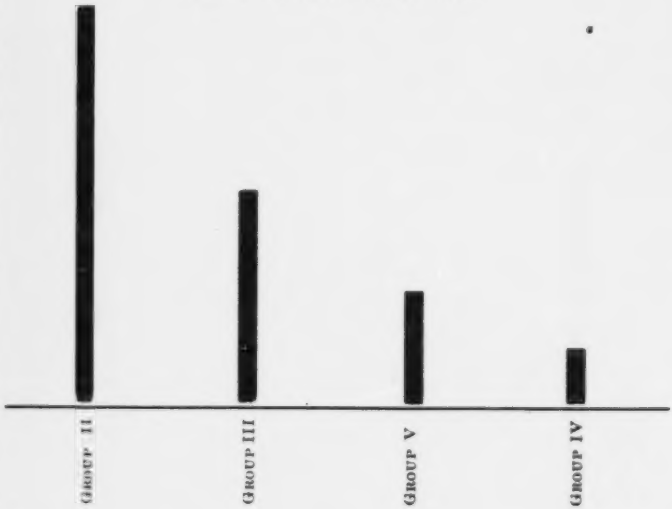
The following diagram (F) illustrates the difference between

the railroads in groups II., III., IV. and V. in their "earnings from freight service" during the year 1894.

Statistics of Railways (1894). Appendix Diagram No. 4.

DIAGRAM F.

"EARNINGS FROM FREIGHT SERVICE."



The following diagram (G) illustrates the difference between said railroads in their "earnings from passenger service" during the year 1894.

Statistics of Railways (1894.) Appendix Diagram No. 4.

DIAGRAM G.

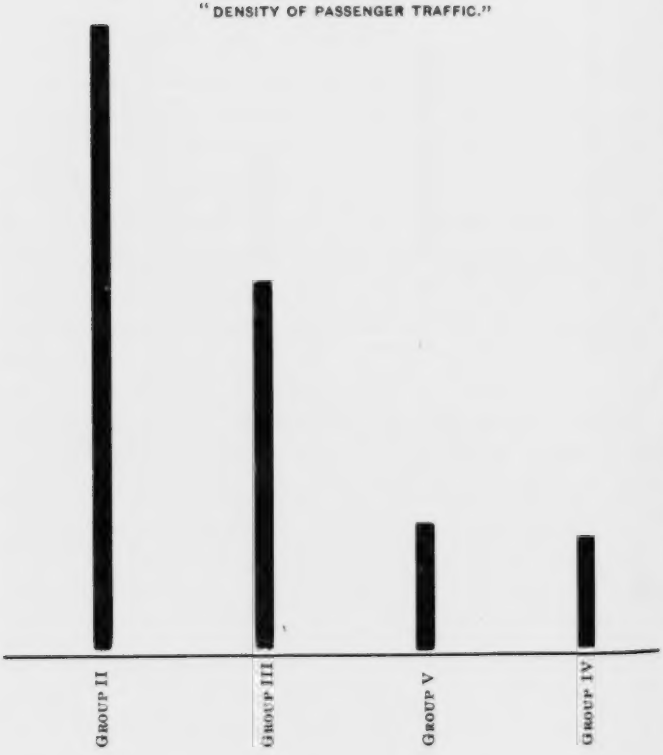
"EARNINGS FROM PASSENGER SERVICE."

The following diagram (H) illustrates the difference between said railroads in "the density of passenger traffic" during the year 1894.

Statistics of Railways (1894.) Appendix Diagram No. 6.

DIAGRAM H.

"DENSITY OF PASSENGER TRAFFIC."

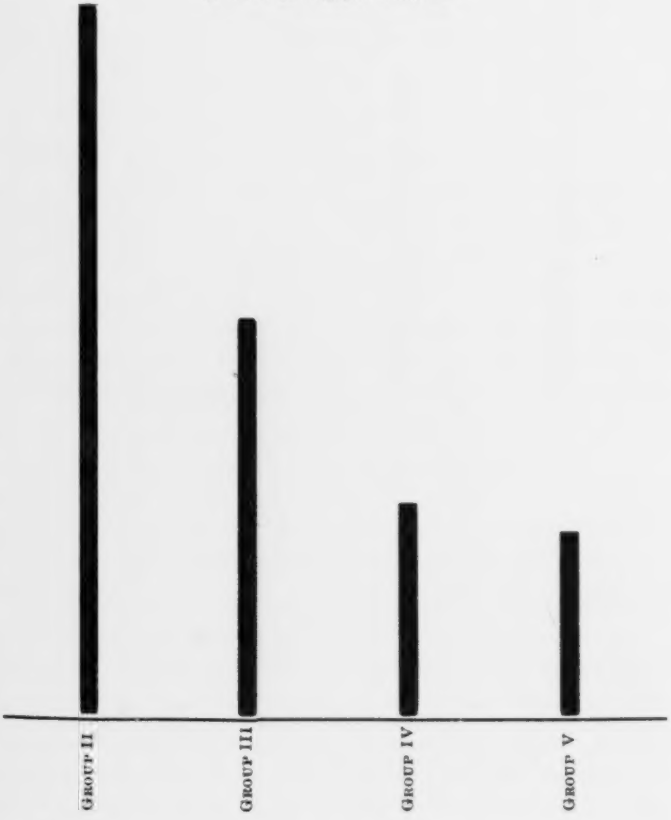


The following diagram (I) illustrates the difference between said railroads in "the density of freight traffic" during the year 1894.

Statistics of Railways 1894. Appendix Diagram No. 7.

DIAGRAM I.

"DENSITY OF FREIGHT TRAFFIC."

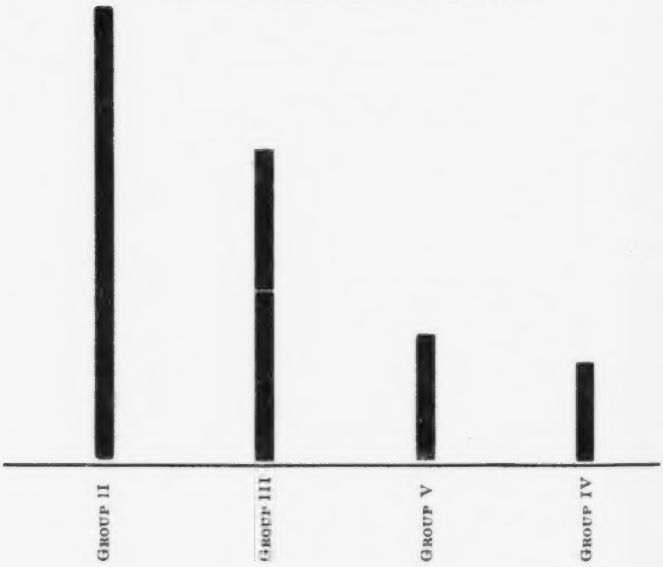


The following diagram (J) illustrates the difference between said railroads in the proportion of capital stock upon which dividends were paid during the year 1894:

Statistics of Railways (1894). Appendix Diagram No. 2.

DIAGRAM J.

"CAPITAL UPON WHICH DIVIDENDS WERE PAID."



When we compare the railroads in the Trunk Line territory with those in the Southern territory, whether we look to their "earnings from freight service;" or to their "earnings from passenger service;" or to their "density of passenger traffic;" or to their "density of freight traffic;" or to the proportion of their "capital stock upon which dividends were paid during the year 1894;" a mere glance at said diagram is sufficient to show that it is impossible for the Southern railroads to operate under Trunk Line rates. In fact, it is difficult to see how the Southern railroads can be operated, as they are, under rates which are only one-third higher per ton per mile, than the Trunk Line rates.

XXXVIII.

The Competition which Exists at Nashville is Entitled to the Same Consideration Under the Third Section as it is Under the Fourth Section of the Act to Regulate Commerce.

In the case of the Texas & Pacific Ry. vs. I. C. C., 162 U. S., p. 232, this Court quotes approvingly the following statement made by Jackson, Circuit Judge, in the case of I. C. C. vs. B. & O. R. R. Co., 43 Fed. Rep., p. 53:

"The English cases establish the rule that, *in passing upon the question of undue or unreasonable preference or disadvantage*, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as the convenience of the public, the fair interests of the carrier, *the relative quantities or volume of the traffic involved*, the relative cost of the services and profit to the company, and the situation and circumstances of the respective customers with reference to each other as *competitive* or otherwise."

162 U. S., p. 232, Tex. & Pac. Ry. vs. I. C. C.

In the same case, this Court, in discussing the *third* section, say:

"In passing upon questions arising under the Act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions, that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, *and in considering whether any particular locality is subjected to an undue preference or disadvantage*, the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment. That among the circumstances and conditions to

be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, *competition that affects rates should be considered*, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not *undue and unjust*, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered," etc.

162 U. S., pp. 233, 234, Tex. & Pac. Ry. vs. I. C. C.

In the case just referred to, the "competitive routes" were either all water lines from Liverpool via Cape Horn to San Francisco, or water and rail lines from Liverpool via the Isthmus of Panama to San Francisco; or water and rail lines from Liverpool to various Atlantic and Gulf ports in the United States, and thence to San Francisco. One of the questions argued in that case was, whether either of said "competitive routes" was "subject to the Act to Regulate Commerce;" and the Commission declined to recognize that case as deciding that competition between carriers which are "subject to the Act to Regulate Commerce" can be considered in determining whether a certain preference or advantage is undue or unjust. That question was definitely settled by this Court in the subsequent case of the Interstate Commerce Commission vs. Alabama Midland Railway Co., 168 U. S., pp. 164-167. See, also, L. & N. R. R. vs. Behlmer, MS. Op. Oct. Term, 1899.

Though, as heretofore conceded, it is competent for the Court, in this case, to determine whether the disparity in rates between Nashville and Chattanooga constitutes an undue preference of Nashville within the purview of the third section, yet, under the cases just cited, I contend that the competition existing at Nashville is entitled to precisely the same consideration under the third section, as it is under the fourth section of the Act.

In the case of I. C. C. vs. C. N. O. & T. P. R'y Co. (known as the Social Circle case), Newman, J., said:

"*As to the question of undue preference, under section* 3 of the Act to Regulate Commerce, it may be stated that, unless the traffic involved here is obnoxious to the fourth clause of the Act, it can hardly be said to be an *undue* preference in favor of Augusta (the longer distance point), or an *undue* prejudice or disadvantage against Social Circle (the shorter distance point). In the Party Rate case (Interstate Commission vs. Baltimore & O. R. Co., 145 U. S., 263, 12 Sup. Ct. Rep., 844), this Court say:

'But, so far as relates to the question of 'undue preference' it may be presumed that Congress, in adopting the language of the English Act, had in mind the construction given to these words by the English Courts, and intended to incorporate them into the statute. . . . In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike, under the same conditions and circumstances, and that any fact which produces an inequality of condition, and a change of circumstances, justifies an inequality of charge.'

"So that, unless the rates complained of, as compared with each other, violate the fourth section of the Act, there seems to be very little ground for claiming that they violate the 'undue preference' provisions of the third section."

56 Fed. Rep., 947, 948.

XXXIX.

THE MERE FACT OF COMPETITION DOES NOT RELIEVE A CARRIER; BUT COMPETITION THAT AFFECTS RATES AND SUBSERVES THE PUBLIC INTEREST MAY DO SO.

Counsel for the appellee referred in argument, in the court below, to the following language used by this Court in the Alabama Midland Railway case, viz.:

"In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do

not hold that the *mere* fact of competition, *no matter what its character or extent*, necessarily relieves the carrier from the restraints of the third and fourth sections," etc.

168 U. S., 167.

I do not contend "that the *mere* fact of competition, no matter what its character or extent," necessarily "relieves the carrier from the restraints of the third and fourth sections." My only contention is, that "competition *that affects rates* should be considered." And that proposition has been distinctly decided by this court both in the case of the Texas & Pac. Ry. vs. I. C. C., 162 U. S., 233; and in the case of I. C. C, vs. Alabama Midland Ry. Co., 168 U. S., p. 166.

See also L. & N. R. R. vs Behlmer, MS. Op. Oct. term 1899.

In the case at bar, the Commission finds and reports that the rail competition at Nashville does "*affect the rates*" which the appellant carriers accept on traffic from New York to Nashville. The language of the Commission is:

"These lines *are under compulsion, therefore, to meet the rate which other carriers have established, or leave those carriers in undisturbed possession of the entire traffic. They have no alternative but to accept the measure of compensation dictated by independent rivals, or abandon the large percentage of Nashville business which they now secure.*"

Trans. p. 53.

Counsel for the appellee also quoted in argument, in the court below, the following language from the opinion of this court in the Alabama Midland Railway case, viz.:

"The competition may in some cases be such as, *having due regard to the interests of the public and of the carrier*, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration."

168 U. S., p. 167.

I contend that the competition in Nashville "ought justly to have effect upon the rates," if we are to have due "regard to the interests of the public."

As said by this court in 168 U. S., pp. 165-166, and in 162 U. S. pp. 233-234, "the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment."

The "places of shipment" include Boston, New York, Philadelphia, Baltimore, and other Eastern cities. The communities occupying the localities where the goods "are delivered" include the communities at Chattanooga and at Nashville.

The welfare of New York and other Eastern cities, and the welfare of Nashville are to be considered, as well as the welfare of Chattanooga. New York and other Eastern cities are entitled to the advantage which accrues to them from the competition afforded by the Trunk Lines and the Louisville & Nashville Railroad from New York, via Cincinnati, to Nashville; and they are also entitled to the advantage of the competition afforded by the appellant lines from New York, via Chattanooga, to Nashville. Nashville is also entitled to the benefit of the competition which exists between the route, via Cincinnati, and the appellants' route via Chattanooga. Nashville is as much entitled to the advantage of the fact that she can avail herself of the competition which exists between those rival routes, as Chattanooga is entitled to avail herself of the advantage of the fact that she is somewhat nearer than Nashville to New York and other Eastern cities; a fact which, though true when measuring by the appellants' route via Chattanooga, is not true when measuring by the Trunk Line route via Cincinnati.

Phipps vs. L. & N. W. Ry. Co., Law Rep. (1892), Q. B., 329, et seq.

The Phipps case was cited approvingly by this Court in 162 U. S., 224, T. & P. Ry. vs. I. C. C.; and 168 U. S., p. 164, I. C. C. vs. Alabama Midland Ry. Co. et al.

I also contend that the competition at Nashville "ought justly to have effect upon the rates," if we are to have due "regard to the interests" of the appellant carriers. The Commission found as a fact that "there is a conceded margin of profit in the rates now in force to Nashville" . . . . "*with reference to the additional expense incurred in carrying Eastern traffic to that point.*"

Trans. p. 63.

It is to the fair interests of the appellants to be allowed to earn that "margin of profit," however small it may be. It is by making small "margins of profits," on large volumes of low rate traffic, shipped over long distances, that much of the revenue of railroad companies in this country is earned.

So long as there is any "margin of profit" at all, the appellants sustain no loss in the carriage of traffic to Nashville; and therefore they are under no temptation to increase the rates to Chattanooga, or to any other point, to recoup against loss. In other words, to paraphrase the language of this court, "having due regard to the interests of the public, as well as of the appellant carriers, the competition at Nashville ought justly to have effect upon the rates;" and the Commission ought, in this case, to have allowed the appellant carriers to take that competition into consideration, notwithstanding it was competition between carriers "*confessedly amenable to the Act to regulate Commerce.*"

XL.

The mere Fact that there is a Material Disparity Between the Rates to Nashville and Chattanooga Does Not, of Itself, Constitute an Undue Preference, or an Unjust Discrimination.

In the case of the Texas & Pacific Railway vs. Interstate Commerce Commission, 162 U. S., 219, 220, this court says:

"The mere circumstance that there is, in a given case, a pref-

erence or an advantage, does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the Act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable."

In the same case, on page 239, the Court say:

"The mere fact that the disparity between the through and the local rates was considerable, did not, of itself, warrant the Court in finding that such disparity constituted an undue discrimination—much less did it justify the Court in finding that the entire difference between the two rates was undue or unreasonable, especially as there was no person, firm or corporation complaining that he or they had been aggrieved by such disparity."

In the case of the Savannah Bureau of Freight & Transportation vs. The Charleston & Savannah Ry. Co., 7 I. C. Rep., p. 480, the Commission having decided that certain shorter distance rates involved in that case were not in violation of the *fourth* section, says:

"Whether those rates are in violation of the *third* section, in that they give an undue preference to the more distant point, is a different question which might arise in cases of this kind. It is incidentally raised by the allegations in this complaint, but was not relied upon on the trial. There is nothing in the case which bears upon it except the mere fact that the rate to the intermediate point is higher. Under these circumstances we have not considered the question as fairly before us, and do not pass upon it in disposing of the case."

I have shown in this argument that, in the case at bar, the Commission based the order in controversy upon the *fourth* sec-

tion; that all other questions that might have been raised and decided were treated by the Commission as merely incidental. In that respect, the case at bar is analogous to the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co., just referred to. In the case at bar, as in that case, there is nothing which bears upon the question of undue preference, "*except the mere fact that the rate to the intermediate point is higher.*"

Under the authority of the case of the Texas & Pacific Railway vs. I. C. C., as well as under the authority of the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co., cited above, I contend that there is no sufficient evidence in this case to justify this Court in declaring that the mere disparity in rates between Nashville and Chattanooga constitutes an undue preference in favor of the former, or an undue prejudice against the latter.

In the case at bar, this Court is asked by counsel for the appellee to do precisely what the Commission refused to do in the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Company, viz., to declare that the appellants have given undue preference to the longer distance point; when there is nothing in the case which bears upon that question, except the mere fact that the rates to the shorter distance point are higher. This Court is asked to do the very thing for which this Court reversed the Court of Appeals in the case of Texas & Pacific Railway vs. Interstate Commerce Commission, namely, to declare that the mere fact that the disparity between rates is considerable warrants the Court in finding that such disparity constitutes "an undue discrimination." It is certain that this Court has no more evidence before it in this case than the Commission had before it in the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Railway Company; or the Court of Appeals had before it in the case of the Texas & Pacific Railway Co. vs. I. C. C., upon which to predicate a decree that the rates in controversy are violative of the third section.

XLI.

The "Scale of Comparison" Suggested by Judge Severens Cannot be Used in Practical Rate-Making.

In the case at bar, Judge Severens said:

"In other words, my opinion is that the restraint of *Section* 4 is to be applied upon *the scale of comparison between the dissimilarity of conditions and the disparity of rates* and that it is competent under *that* section to restrain the exaction of the greater charge for the shorter haul, although there may be a substantial dissimilarity of conditions, provided the dissimilarity is not so great as to justify the discrimination made."

Trans. p. 379.

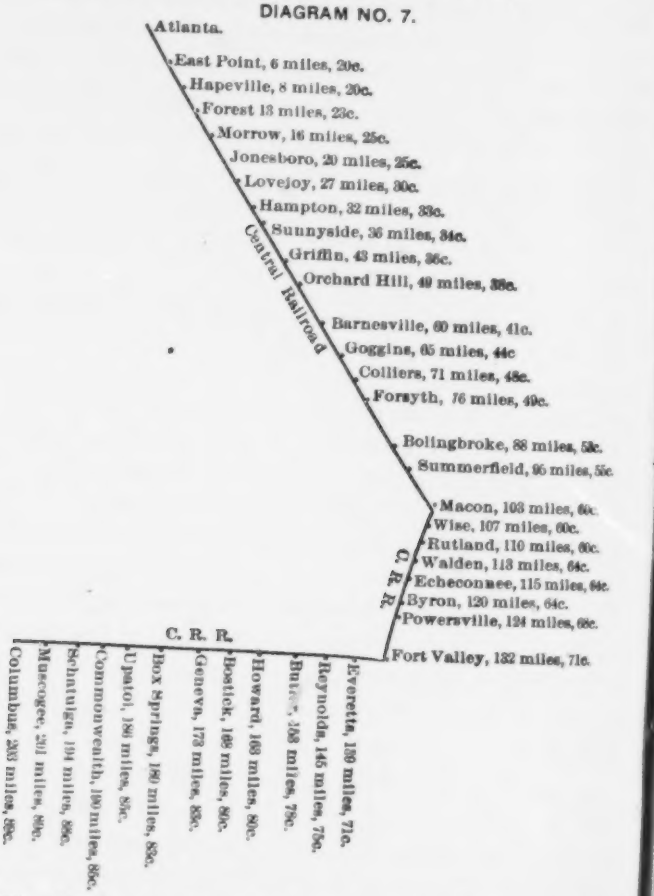
It is one thing to state a theoretical proposition, and quite another thing to formulate a practical rule.

In the enforcement of the Act to Regulate Commerce, the courts will necessarily be compelled to formulate certain rules for rate-making, to be followed by the railroad traffic managers of the country. The subject of rate-making is an eminently practical subject; and such rules as the courts may formulate must be such as can be practically applied to the commerce of the country, or they will be useless, if not injurious. With the utmost respect for Judge Severens, I submit that there is no theoretical mathematician who can understand what he means by the phrase, "the scale of comparison between the dissimilarity of conditions and the disparity of rates;" and I also submit that there is no practical railroad traffic manager who can make out a tariff or schedule of rates upon any such "scale of comparison" as Judge Severens suggests.

For the purpose of demonstrating my proposition that the "scale of comparison" suggested by Judge Severens cannot be used in practical rate-making, we will suppose that the following diagram, No. 7, represents the Central of Georgia Railroad, running from Atlanta, via Macon and Ft. Valley, to Columbus, Ga., a distance of 203 miles. As that portion of the line lies wholly within the State of Georgia, its maximum rates are fixed by the Railroad Commission of that State. Freight tariffs as fixed by the Georgia Railroad Commission are constructed upon a mileage

basis, i. e., the rates increase as the distance increases; though not in the same proportion. The diagram shows certain designated local stations with their respective distances from Atlanta, and the rates in cents per hundred pounds as fixed by the Georgia Railroad Commission for the transportation of first-class freight from Atlanta to said stations, respectively:

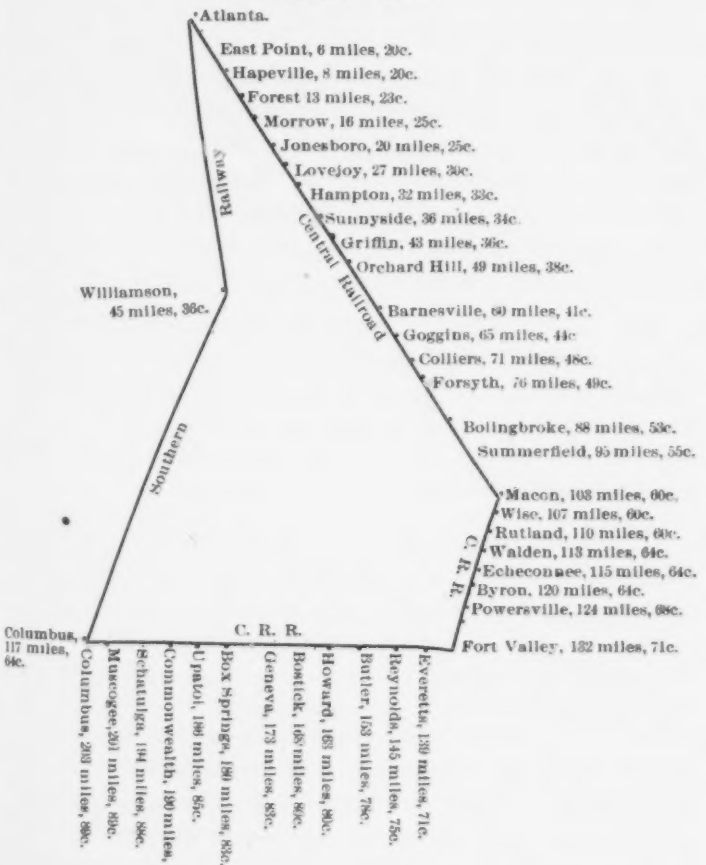
DIAGRAM NO. 7.



We will suppose that for a number of years the Central Railroad was the most direct route between Atlanta and Columbus; and the one usually employed in the transportation of freight between those cities. As the rates from Atlanta to all of said local stations were constructed upon a mileage basis, and as there

was no instance in which a greater charge was made for a shorter than for a longer distance, people living along the line were doubtless entirely satisfied with the rate adjustment. We will suppose, however, that within a recent period two railroads have been constructed, both of which have been acquired by the Southern Railway; and by using a portion of each of them, a new line between Atlanta and Columbus has been opened for business, which is only 117 miles long, as against 203 miles by the old line of the Central. The new line is shown on the following diagram, No. 8:

DIAGRAM NO. 8.



In the case supposed, under the mileage tariff, as fixed by the Georgia Railroad Commission, the Central was, and still is, entitled to charge 89 cents per hundred pounds, for the transportation of first-class freight, 203 miles from Atlanta to Columbus.

The Georgia Railroad Commission also fixed the tariff of freight rates for the Southern Railway over the new line; and said tariff was constructed upon the same mileage basis as the tariff of the Central Railroad. The distance from Atlanta to Columbus by the new line of the Southern Railway being only 117 miles, the rate on first-class freight from Atlanta to Columbus by that line, as fixed by said Commission, cannot exceed 64 cents per hundred pounds.

It is obvious that upon the completion of the new line, the traffic manager of the Central was confronted with the question whether he would continue to charge 89 cents per hundred pounds, as he had the right to do, for transporting freight 203 miles from Atlanta to Columbus; or ignore the difference in distance between his line and the new line, and accept 64 cents per hundred pounds; it being the rate fixed for his rival.

It is quite clear that he was compelled to accept the same rate as his rival, or abandon the competitive traffic altogether. No one would pay the Central 89 cents per hundred pounds, for transporting freight from Atlanta to Columbus, when for 64 cents per hundred pounds its transportation could be obtained over a new and shorter route, and in less time.

If the traffic manager of the Central Railroad of Georgia had concluded to abandon the competitive traffic to his rival, one effect would have been to deprive Atlanta and Columbus of the service of the Central Railroad, notwithstanding it had been for many years the only railroad serving those cities. Another effect would have been to deprive the stockholders and bondholders of the Central Railroad of all revenue theretofore realized by that railroad from the transportation of traffic between Atlanta and Columbus; unless the Georgia Railroad Commission had permitted the Central Railroad to increase its local rates so as to reimburse it for the loss sustained by being forced to abandon

the competitive traffic. If the traffic manager of the Central Railroad had ascertained that he could earn sufficient revenue, at the reduced rate, to pay something more than the additional cost of movement of the competitive traffic, he would naturally have determined to continue to carry freight from Atlanta to Columbus. It would still have been necessary for his trains to run from Atlanta in the direction of Columbus, in order to carry freight from Atlanta to the local stations on the Central Railroad; and the additional cost of carrying, in the same trains, a few cars of freight loaded at Atlanta, and destined to Columbus, would be comparatively small. If he could earn anything over such additional cost of movement, while it might not be sufficient to pay anything toward dividends, or even toward fixed charges, it would still be a profit *over what it would cost to move that particular freight;* and however small it might be, it would contribute something toward the operating expenses. At all events, it would not be any burden upon the other traffic.

We will suppose, therefore, that the traffic manager of the Central Railroad did conclude to continue carrying freight from Atlanta to Columbus; and that he was forced to accept 64 cents per hundred pounds for the service. *The question arises, how was he to apply the "scale of comparison" suggested by Judge Severens?* It will be seen from the diagrams above referred to in this section, that on the mileage basis upon which the tariff of the new line, as well as that of the old line, was constructed, Byron, a local station on the old line 120 miles from Atlanta, has the same rate as Columbus on the new line—i. e., 64 cents per hundred pounds. It will also be seen that the rates from Atlanta to all of the local stations on the old line, between Byron and Columbus, are higher than the rate from Atlanta to Columbus by the new line; because all of said local stations are more distant from Atlanta than Columbus is, by the new line.

If the traffic manager of the Central Railroad of Georgia did conclude to accept 64 cents per hundred pounds from Atlanta to Columbus, *how was he to readjust the rates from Atlanta to the local stations on his line between Byron and Columbus?* Was he to reduce the rates from Atlanta to all of those stations to 64 cents per hun-

dred pounds, so as to make them not higher than the rate to Columbus? If he was not to reduce them to the level of the Columbus rate, *to what extent was he to reduce them?* Take the rate from Atlanta to Butler, which was 78 cents. Was that rate to be reduced to 64 cents, or 65 cents, or 66 cents, or 67 cents, or 68 cents, or 69 cents, or 70 cents, or 71 cents, or 72 cents, or 73 cents, or 74 cents, or 75 cents, or 76 cents?

The "dissimilarity of conditions" created at Columbus by the opening of the new line necessitated a reduction from 89 cents to 64 cents per hundred pounds, in the rate from Atlanta to Columbus. Now, if there was to be *any* "disparity of rates" as between Columbus, and the local stations on the old line, from Byron to Columbus, *how was the amount of that "disparity" to be ascertained?* I repeat that there is no theoretical mathematician, or practical traffic manager, who can take the diagrams referred to above, *and mark opposite each of the local stations on the old line between Byron and Columbus the rate that ought to be fixed from Atlanta to that station, so that the rates will comply with Judge Severens' "scale of comparison between the dissimilarity of conditions and the disparity of rates."* If the roads represented in said diagrams were interstate roads, the Interstate Commerce Commission, prior to the Alabama Midland Ry. decision, would have reduced all of the rates from Atlanta to the local stations between Byron and Columbus down to the level of the Columbus rate. In that case there would have been no "*disparity* of rates," and consequently no use for a "scale of comparison between the dissimilarity of conditions and the disparity of rates." But since the decision in the Alabama Midland Ry. case, the competition at Columbus would be recognized as constituting a substantial "dissimilarity of conditions;" and a "disparity of rates" would exist to the extent of the difference between the new rate from Atlanta to Columbus, and the old rates from Atlanta to the respective local stations on the old line between Byron and Columbus; and if Judge Severens' "scale of comparison" is of any value, *it ought to enable us to determine the precise amount of reduction that ought to be made in the rate to each of those stations.*

My contention is, that instead of attempting to use the theoretical and impracticable "scale of comparison" invented by Judge Severens, the Commission and the Court should determine from the testimony, First: Whether it would subserve the interest of the public as well as of the Central Railroad, for the latter to compete at Columbus, at the new rates offered by the new road; and second: Whether the rates charged to stations between Byron and Columbus would have been regarded as just and reasonable if the new road had not been constructed; and if these two facts be decided in the affirmative, "the extent of the discrimination" *will determine itself*, and will amount exactly to whatever the difference may happen to be between the reasonable rates charged to stations between Byron and Columbus, and the lower rates forced by the competition of the new road at Columbus, the longer distance point.

XLII.

Judge Severens' Error in Construing My Argument as Contending that the Extent of the Discrimination Must be Confided to the Judgment of Railroad Officials.

In the case at bar, Judge Severens said that the argument of counsel for the carriers was, in effect, that "the *extent* of the discrimination must be confided to the judgment of the railroad officials, whose ability and experience best qualify them for the task," and that "there is nothing for the Commission or the Court to do but to take notice of the fact that the conditions are dissimilar, and abandon all further inquiry."

Trans. p. 377, 378.

His Honor misapprehended my argument. I have never claimed that the "extent of the discrimination" must be confided to the judgment of railroad officials; nor have I ever denied the right of either the Commission or the Court to review the judgment of railroad officials on any question.

My argument was, as it now is, that where the existence of

competition at a longer distance point is such as to create a substantial dissimilarity between the circumstances and conditions which exist at that point, and those which exist at a shorter distance point, neither railroad officials, nor commissions, nor courts, can determine "the extent of the discrimination" by any such "scale of comparison between the dissimilarity of conditions and the disparity of rates" as was suggested by Judge Severens.

My contention was, and is, that the *extent* of the discrimination" *determines itself.* If the rates to the shorter distance point be reasonable within the purview of the first section, and competition forces lower rates to some longer distance point, there is but one question submitted either to the carrier, the Commission or the Court, and that is whether it will subserve the public interest, as well as the carrier's interest, for the carrier to compete at such longer distance point.

The decision of that question by the carrier may be reviewed either by the Commission, or the Court. But if the Commission or the Court agrees with the carrier that it will subserve the public interest, as well as the interests of the carrier, for the carrier to compete at the longer distance point, then "the extent of the discrimination" *will determine itself*; and it will amount to exactly the difference between the reasonable rates charged to the shorter distance point, and the lower rates forced by competition to be charged at the longer distance point; whatever that difference may happen to be.

XLIII.

The Limitations Which May Reasonably Be Imposed Upon Carriers in the Exercise of Their Rights to Take Into Consideration Competition, as One of the Circumstances and Conditions Affecting Transportation.

My contention concedes that carriers in exercising the right to take into consideration competition, as one of the circum-

stances and conditions affecting transportation, must act within "reasonable limits."

In the case at bar I suggest that the "reasonable limits" imposed upon the exercise of said rights are three; each of which is eminently practical, and capable of judicial determination.

First: The rates charged by the appellants to Chattanooga, the shorter distance point, must not be unjust or unreasonable, within the purview of the first section of the Act; i. e., they must be such as would have been regarded as just and reasonable if lower rates were not charged to Nashville, the longer distance point.

Second: The competition at Nashville must be such as subserves the public interest. It must also be real; and such as to compel the acceptance by the appellants of the rates that are accepted by them at that point.

Third: The rates accepted by the appellants on traffic to Nashville, the longer distance point, must yield some profit (though it may be very small) *over the additional cost of the movement of that traffic.*

Within the above limits, any rates which may be accepted by the appellants upon traffic to Nashville, the longer distance point, are lawful.

The first limitation suggested by me concedes that the rates charged by the appellants to Chattanooga, the shorter distance point, must not be unjust or unreasonable; i. e., they must be such rates as would be regarded as perfectly fair, were it not for the fact that the appellants are accepting less rates to Nashville, the longer distance point.

If the rates charged by the appellants to Chattanooga, the shorter distance point, are not just and reasonable, they violate the first section of the Act; they must be condemned under that section; and there is no need to invoke the operation of either of the subsequent sections.

But if the rates charged by the appellants to Chattanooga are just and reasonable (a question which I will consider hereinafter

under the first section of the Act), we have the case of a complaint made on behalf of certain persons at Chattanooga who are charged rates which are perfectly just and reasonable; and whose only real objection is that the appellants are accepting less rates to Nashville, a longer distance point.

As said by Lord Curriehill, in Hozier vs. the Caledonian Ry. Co., their complaint "may be likened to that of the laborer, who, having worked all day, complained that others, who had worked much less, received a penny like himself."

1 Nev. & Mac., 32, Note 4; 1 Nev. & Mac., pp. 45–47, Jones vs. E. C. Ry. Co.; 2 Nev. & Mac., p. 202, Foreman et al. vs. Great Eastern Ry. Co.; 1 Nev. & Mac., pp. 97–108, Harris vs. Cockermouth, etc., Ry. 1 Nev.; & Mac., p. 120, Ransome vs. E. C. Ry. Co.

The Hozier case was cited by this Court in 145 U. S., p. 282; and in 162 U. S., p. 222.

The Jones case was cited by this Court in 145 U. S. p. 283.

The Foreman case was cited by this Court in 162 U. S. p. 222.

And the Harris case was cited by this Court in 162 U. S., pp. 223, 224.

If the rates from New York and other Eastern cities to Chattanooga are just and reasonable, in and of themselves (the question which I will hereinafter consider under the first section), the appellants ought not to be required to reduce them, even though such reduction may be necessary to place Chattanooga upon a "rate equality" with Nashville; because such a reduction in rates to Chattanooga not only involves a serious reduction in the revenue which the appellants derive from the present rates on Eastern traffic *to Chattanooga; but it also involves a serious reduction in the revenue which they derive from the present rates on Eastern traffic to the twenty-four other cities, with which Chattanooga is grouped.*

It appears from the report of the Commission that Chattanooga is grouped with, and takes the same rail and water rates from New York and other Eastern cities on all classified traffic

as the twenty-four following cities located in the same territory, viz.: Dalton, Rome, Atlanta, Americus, Athens, Columbus, Ft. Gaines, Griffin, Huntsville, Decatur, Sheffield, Tuscumbia, Florence, Gadsden, Oxford, Talladega, Anniston, Birmingham, Opelika, Montgomery, Selma, Eufaula, Enterprise, and Meridian.

Trans. p. 48.

If the rates from New York and other Eastern cities to Chattanooga should be reduced, without making the same reduction to the above-mentioned cities, with which Chattanooga is grouped, their trade would be unjustly diverted from them to Chattanooga; and if the same reduction should be made in the rates to those cities that would be made in the rates to Chattanooga, the loss of revenue to the appellants would be appalling. While the appellants have no right to subject Chattanooga to any *undue* prejudice or disadvantage, or to give Nashville any *undue* preference or advantage, yet, unless the advantage which Nashville has over Chattanooga in the matter of rates from New York and other Eastern cities *is* an *undue* advantage, the appellants are under no obligation, either legal, or moral, to submit to such an enormous loss of revenue, merely to force an equality of Eastern rates, as between Nashville and Chattanooga.

The second limitation suggested by me concedes that the competition at Nashville, the longer distance point, must be such as subserves the public interest; that it must be real, and not feigned or fraudulent; and that it must be effective; i. e., such as to compel the acceptance of the rates that are accepted by the appellants to that point.

If the competition at Nashville is simulated or fraudulent, then my proposition concedes that it does not fall within the "*reasonable limits*" of the privilege accorded to carriers of regarding competition as one of the bases on which to regulate their action in prescribing rates.

There is no pretense, however, that the competition at Nashville is either simulated or fraudulent. The language of the Commission is "The Nashville rate *is independent of the lines operating through Chattanooga, and those lines have no voice in deter-*

mining its amount. That rate is made by the all-rail carriers via Cincinnati, and their action is uncontrolled by the defendant lines."

Trans. p. 49.

Again the Commission says:

"*These lines (i. e. the appellants') are under compulsion therefore to meet the rates which other carriers have established, or leave those carriers in undisturbed possession of the entire traffic. They have no alternative but to accept the measure of compensation dictated by independent rivals, or abandon the large percentage of Nashville business which they now secure.*"

Trans. p. 53.

The third limitation suggested by me concedes that the rates accepted by the appellants on traffic to Nashville must yield some profit (though it be very small) *over the additional cost of the movement of that traffic.*

If the appellant lines are capriciously, wantonly or recklessly carrying Eastern traffic to Nashville at a loss, it is not only an undue preference of Nashville, and an undue prejudice against Chattanooga, but it is an injustice to the appellants' stockholders and creditors. But if the appellants are realizing *any* "margin of profit" *over the additional expense incurred in carrying the Eastern traffic to Nashville*, it is their duty to their stockholders and bondholders to earn such revenue as they may be able to realize from that traffic; and in doing so, they inflict no injury whatever upon Chattanooga.

To show that I am right in this statement, suppose the appellants should withdraw absolutely, and at once, from the carriage of Eastern traffic to Nashville. Would the rates from New York and other Eastern cities to Nashville be raised? Certainly not. They would remain just as they are; and the disparity which now exists between the Eastern rates to Nashville, and the Eastern rates to Chattanooga, would continue to exist, just as at present. I have shown repeatedly above, from the findings of the Commission itself, that the appellants do not make the rates to Nashville; that they have no control over those rates; and that they have not even a voice in determining what they shall be.

I have shown from the findings of the Commission, that said rates are made by the Trunk Lines, and the Louisville & Nashville Railroad, operating through Cincinnati; and I have shown why it would be impossible for the appellants to induce the Trunk Lines, and the Louisville & Nashville Railroad, to agree to increase those rates.

The Commission, speaking of the Trunk Lines and the Louisville & Nashville Railroad, said:

"These carriers established rates and united in joint tariffs from Eastern points to Nashville, long before the lines through Chattanooga engaged in the Nashville business. The acceptance of the rates so fixed by the rail lines via Cincinnati was the necessary condition upon which the lines via Chattanooga could compete for Nashville traffic."

Trans. p. 49.

Assuming the fact to be as stated by the Commission, it is apparent that if the Trunk Lines in connection with the Louisville & Nashville Railroad established the present rates from Eastern points to Nashville, before the lines through Chattanooga engaged in the Nashville business, the Trunk Lines and the Louisville & Nashville Railroad would continue to carry the Eastern business to Nashville at the same rates after the appellants should have been forced by the order of the Commission in this case to withdraw from the Nashville business. *The result therefore of enforcing the Commission's order would not be to change the present relative adjustment of rates as between Nashville and Chattanooga in the least.*

The Trunk Lines and the Louisville & Nashville Railroad cannot increase the Eastern rates to Nashville. And the appellants cannot reduce the Eastern rates to Chattanooga, without sustaining a loss in revenue not only on all Eastern traffic carried to Chattanooga, but also on all Eastern traffic carried to Dalton, Rome, Atlanta and the remainder of the twenty-four Southern cities which have the same Eastern rail and water rates as Chattanooga.

To be sure, if the present Eastern rates to Chattanooga are

unjust and unreasonable, in and of themselves, they must be reduced to the proper figures, even if it results in the bankruptcy of every appellant in this case. I do not contend that the solvency or insolvency of a railroad company is the slightest justification for any violation of the law; but the proposition for which I am contending in this section of my argument assumes, as I have before stated, that the Eastern rates to Chattanooga *are* just and reasonable, in and of themselves; and if they be so, I contend that the appellants ought not to be forced to reduce them below what is just and reasonable, when to do so would not benefit Chattanooga in the least, but would involve the appellants in a serious loss of revenue

All three of the limitations suggested by me at the head of this section are entirely practical.

Though the question of the reasonableness of the rates to Chattanooga, the shorter distance point, involves, as is hereinafter shown, a very difficult problem; it is one which, upon proper evidence, is capable of judicial determination; and there are many cases in the Federal Jurisprudence in which such questions have been determined by the courts.

It is also entirely practicable to determine whether the competition at Nashville subserves the public interest; whether it is real; and whether it is such as to affect rates.

It is also entirely practicable to ascertain whether the rates accepted by the appellants on traffic to Nashville yield a profit over the additional cost of the movement of that traffic. For, while it is impossible to ascertain the cost of carrying any particular ton of freight, or any particular class of freight, it is entirely practicable to closely approximate how much the expenses of a railroad will be increased by moving a certain traffic, over and above what they would be, if that particular traffic were declined; and such increase represents what is called the "*additional cost of movement.*"

I submit that the practical limitations, which I have suggested, are far preferable to the theoretical "scale of comparison

between the dissimilarity of conditions and the disparity of rates," suggested by Judge Severens.

It may be contended by counsel for appellee that if I am correct in the position taken by me, to the effect that if the appellants should withdraw from carrying Eastern traffic to Nashville, the Trunk Lines, in connection with the Louisville & Nashville R. R., would continue to carry said traffic, at the same rates as are now charged, I must be incorrect in another position taken by me, to the effect that the Eastern cities, as well as Nashville, are interested in the appellant lines, being allowed to compete for said traffic.

The contention of counsel for appellee is that unless the withdrawal of appellants from the carriage of Eastern traffic to Nashville would result in an *increase in the rates* from the East to Nashville, neither the Eastern cities, nor Nashville, would be injured by such withdrawal. But the contention overlooks the fact that the beneficial effects of competition are manifested in many ways besides in the mere reduction of rates. Politeness of railroad officials; excellence of track and cars; speed of trains; promptness in the receipt and delivery of freight; care in the handling of freight in depot, and on train; liberality and promptness in the adjustment of claims for lost or damaged freight; are only a few of the many beneficial effects of competition which are entirely distinct from the rates charged for transportation.

In this case, it appears that though the rates from the East to Nashville have, for many years, been precisely the same via Cincinnati, as via Chattanooga, (Trans. p. 45)—the appellant lines now carry, via Chattanooga, more than one-half of the Eastern traffic to Nashville; notwithstanding the fact that in former years 90 per cent. of that traffic was carried via Cincinnati to Nashville.

Trans. p. 206.

These facts prove that though *rates* may be the same by all competing lines, there may exist many reasons why the public should prefer one of the lines to the other.

XLIV.

The Argument of Appellee that While Some Difference Between the Rates to Nashville and the Rates to Chattanooga May be Justifiable, the Present Difference is Too Great.

It is said that the difference between the Eastern rates to Nashville, and the Eastern rates to Chattanooga, is so great that in certain instances it has been possible to ship freight from New York, through Chattanooga, to Nashville, and then back from Nashville, through Chattanooga, to points south and east of Chattanooga, at less rates than those which would have to be paid if such freight were shipped from New York direct to Chattanooga, and thence to points of ultimate destination. Some isolated instances of that kind were proven by some of the witnesses; but Mr. van den Berg testified that in quite a number of other instances the combination of the rates is in favor of Chattanooga.

Trans. pp. 132, 133.

But assuming the fact to be as stated by the other witnesses, how will the evil, if it be one, be remedied by the enforcement of the order "as made" by the Commission in this case?

The order of the Commission is that the appellants shall desist from charging "ANY" higher rates on Eastern traffic to Chattanooga than they may be charging at the same time on Eastern traffic to Nashville. The testimony shows that the loss of net revenue to the appellants would be very much less by abandoning the Eastern traffic to Nashville, than it would be by reducing their Eastern rates to Chattanooga, and the twenty-four other Southern cities with which Chattanooga is grouped; and of course the appellants will adopt that line of action which involves the least loss of net revenue. They will abandon the Eastern traffic to Nashville; and they will continue to maintain their present rates on Eastern traffic to Chattanooga; provided those rates are just and reasonable within the purview of the first section. The result will be that the disparity which now

exists between the Eastern rates to Chattanooga, and the Eastern rates to Nashville, will continue to exist as heretofore; and if that disparity is such as to enable freight to be shipped from Eastern cities, via Cincinnati, to Nashville, and from Nashville, through Chattanooga, to points south or east of there, such shipments can be made hereafter, if they have been made heretofore.

The Commission was quite right in stating (as it did in its report and opinion) that the "complainant's case was presented on the theory that the prohibitive requirements of the statute should be strictly enforced against these defendants, while they in turn contended that the full difference now maintained between rates to Chattanooga and to Nashville was justified by the necessities of the situation."

Trans. p. 55.

There was no middle ground for either party to assume. There is no possible mode of "*measurably*" adjusting the relation between Nashville and Chattanooga, as to Eastern rates. Neither the appellants nor their Trunk Line rivals can increase the Eastern rates to Nashville; and the appellants must accept those rates just as they are, or abandon the Nashville traffic absolutely and altogether.

On the other hand, if they should attempt to reduce the Eastern rates to Chattanooga, unless they should carry the reduction to the point of making those rates the same as the Eastern rates to Nashville, the advantage in favor of Nashville would still continue; though it might differ somewhat in degree. If the appellants should reduce the Eastern rate to Chattanooga to the same as the rates to Nashville, they must also make the same reduction in the Eastern rates to Dalton, Rome, Atlanta, and the remainder of the twenty-four Southern cities, which have the same rail and water rates as Chattanooga.

The Commission did not feel prepared, upon the testimony before it, to make an order which might involve so serious a loss of revenue. The language of the Commission is:

"For these conditions, the carriers complained of do not appear chiefly responsible, because the lower rate to Nashville is

beyond their control, and the allowance of the same rate to the shorter distance point (Chattanooga) might reduce their revenues below the limit of fair compensation."

Trans. pp. 53, 54.

Again the Commission says:

"We refrain from further statement of the reasons which have induced this conclusion, as the amount to which the Chattanooga rate should be reduced will not now be decided."

Trans. p. 54.

Again the Commission says:

"On this ground also, it would seem suitable to allow opportunity for a further hearing before fixing maximum rates on shipments to Chattanooga."

Trans. p. 55.

Notwithstanding the Commission has not made any order stating what reduction, if any, should be made in the rates to Chattanooga, this court is asked to put such a construction upon the order that was made by the Commission, as will necessarily have the effect to either compel the appellants to reduce the Eastern rates to Chattanooga, to the full extent of the difference between those rates and the Eastern rates to Nashville, or abandon the Nashville traffic altogether.

In other words, this Court is asked by a process of construction to give an effect to an order made by the Commission which would result in consequences that the Commission itself was not willing to assume, with the evidence that it had before it; and the evidence taken in the Circuit Court did not materially alter this feature of the case.

XLV.

The Argument of Appellee Would Compel the Adoption of Mileage Rates Which are Impracticable in this Country.

While counsel for appellee contends that there should be some difference in rates in favor of Chattanooga as compared with Nashville, he does not suggest what the differences ought to be. His only suggestion is that the rates to Chattanooga ought not to be higher than the rates to Nashville.

Under the order made by the Commission in this case the appellants are enjoined from charging any greater compensation to Chattanooga than to Nashville, but they are not enjoined from charging as great compensation to the former as to the latter. Such an order is intelligible under the *fourth* section; but it is wholly unintelligible under the *third* section.

If it constitutes undue preference in favor of Nashville, to charge less to it than to Chattanooga, it constitutes unjust prejudice against Chattanooga to charge *as much* to it as to Nashville. If distance is to be the controlling factor in determining whether undue preference or undue prejudice exists in a given case, *all rates must be constructed upon a mileage basis;* and instead of permitting the appellants to charge as much to Chattanooga as to Nashville, the Commission, if it has any power to prescribe future rates, should have ordered the appellants to charge less to Chattanooga; and so reduce their rates to Chattanooga as to make them the same per ton per mile, as those charged to Nashville. In a word, the Commission, if it has any power to prescribe future rates, should have ordered the appellants *to construct their tariff on a mileage basis.*

The theory of equal mileage rates is entirely correct in all cases *where competition does not interfere with it.* But in cases where competition does interfere, the theory of equal mileage rates cannot be adopted in actual practice; and though it has been proposed in every country, it has been abandoned by all.

In the report of the case of Ransome vs. E. C. Ry., on page 71 of 1 Nev. & Mac., in Note 6, there is an abstract from the report of the English Parliamentary Committee upon the amalgamation of railways in 1872, in which they declare equal mileage rates to be impracticable.

First, because "*it would prevent railway companies from lowering their rates so as to compete with traffic by sea, by canal,* OR BY A SHORTER OR OTHERWISE CHEAPER RAILWAY, *and would thus deprive the public of the benefit of competition, and the company of a legitimate source of profit.*"

Second, "It would prevent railway companies from making perfectly fair arrangements for carrying, at a lower rate than usual, goods brought in large and constant quantities, *or from carrying for long distances at a lower rate than for short distances.*"

The report continues: "In short to impose equal mileage rates on the company *would be to deprive the public of the benefit of much of the competition* which now exists, or has existed; to raise the charges on the public in many cases where the companies now find it to their interest to lower them; and to *perpetuate monopolies*, in carriages, trade and manufacture, *in favor of those routes and places which are nearest* and least expensive, where the varying charges of the company now create competition. And it will be found that the supporters of equal mileage, when pressed, often really mean, *not that the rates they themselves pay are too high, but that the rates which others pay are too low.*"

In March, 1885, the Senate appointed a select committee on Interstate Commerce. The committee took a mass of testimony, filling a volume of 1,450 pages, and made a report, which, with its appendix, fills over 200 pages, and in its report it embodied the report of the English Parliamentary Committee, quoted above.

See Report of Senate Select Committee on Interstate Commerce, Jan., 1886, p. 57.

In the case of I. C. C. vs. Alabama Midland Ry. Co., Judge Bruce said: "In the case at bar there are questions of competing

lines; and the proposition of the complainant is that, notwithstanding this, the circumstances and conditions are substantially the same; and that it is in violation of the fourth section of the statute to charge more for the short haul to Troy, the shorter distance, than to Montgomery, the longer distance point. This argument proceeds upon the view that distance is the controlling factor on a question of rate for transportation of property; and yet *these other matters may be, and often are, more controlling than even distance itself.*"

69 Fed. Rep., p. 231. I. C. C. vs. Alabama Midland Ry. Co.

In the case of Imperial Coal Co. vs. Pittsburg & L. E. R. Co., it was said by the Commission that "in determining the question of undue prejudice from a rate, distance is only one of the factors, and other material facts, such as character and quality of the commodity, cost of production, *extent and nature of the competition in the business itself and by other transportation lines*, and the interests of the public in the use of the commodity and its market cost, are to be considered."

2 I. C. Rep., p. 436, Imperial Coal Co. vs. Pittsburg & L. E. R. Co. 3d head note.

In the case of Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Railway Co., decided December 31, 1897, the Commission said:

"Upon the other hand, it often happens that *distance is altogether disregarded*, and it has been held that this may be proper within certain limits and under certain conditions."

7 I. C. Rep., p. 474, Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co.

In the case at bar, the Court is asked to hold that the mere fact that a greater rate is charged for a shorter than for a longer distance constitutes an undue preference of the longer distance point over the shorter distance point. The charge of undue preference *is based upon distance alone;* and it must be sustained, if at all, upon the theory that distance should control in rate-making, to the disregard of all other circumstances and conditions.

XLVI.

If the Failure to Charge According to Distance Constitutes an Undue Preference, All Rates Will Have to be Made on a Mileage Basis.

Counsel for the appellee may contend that, inasmuch as the order of the Commission is simply that the rates to Chattanooga shall not be higher than those to Nashville, it may be complied with by fixing the Chattanooga rates as high as those to Nashville; and that this privilege or option given to carriers to fix rates to Chattanooga as high as to Nashville, *thus ignoring the natural advantage of the former in being the shorter distance point*, is all that can be asked by the carriers, "*and is a reasonable allowance for any dissimilarity of conditions resulting from the competition shown in this case.*"

If the Commission had the legislative power to prescribe rates to be charged in the future, as it at one time claimed to have, I could understand such an expression as "the Commission ignoring the natural advantages of shorter distance points."

With an arbitrary rate-making power at its command, it could, with impunity, ignore the natural or commercial advantages of any city in the Union, and there would be no practical relief, however capricious its action might be.

But, as the Commission has no legislative power, and must act as a quasi-judicial tribunal, what right has it to "ignore the natural advantages" of shorter distance points, if they have the legal right to enjoy those advantages?

I have hereinbefore shown that if it constitutes unjust preference in favor of Nashville to charge less rates to that place than to Chattanooga, it constitutes unjust prejudice against Chattanooga to charge *as high* rates to Chattanooga as to Nashville; and that if distance is to be the controlling factor, the rates

to Chattanooga, and to Nashville, respectively, as well as all other rates, must be constructed *on a mileage basis.*

If Chattanooga is entitled to have its rates constructed on a mileage basis, neither the Commission nor the Court has the right to "ignore its natural advantage" in being the shorter distance point.

But if it be held that Chattanooga is entitled to have its rates constructed on a mileage basis, every other city and station in the United States has the same right; and all rates in this country must be constructed on that basis.

Neither the Commission, nor the Court, has any more power than a railroad to subject Chattanooga to any unjust prejudice; and if it is entitled to have rates constructed on a mileage basis, the Commission and the Court, as well as the railroads, should say so, and not "ignore its natural advantage" by subjecting it to rates *as high* as those to Nashville.

When counsel contends that the privilege given the carriers to charge Chattanooga rates as high as those to Nashville, "is a reasonable allowance for any dissimilarity of conditions resulting from the competition shown in this case," he concedes that a dissimilarity of conditions *has* resulted from that competition; and yet he fails to explain why it would be a reasonable allowance for that dissimilarity to permit the carriers to charge to Chattanooga rates *exactly as high* as those to Nashville, and yet not one cent higher. It is quite easy to make such assertions, but quite impossible to suggest any intelligible reason in support of them.

I hereinbefore showed that it is practically impossible to construct rates upon any "scale of comparison between the dissimilarity of conditions and the disparity of rates;" and it is equally impossible to affirm, with any basis of reason to support it, that a certain relation of rates constitutes "a reasonable allowance for dissimilarity of conditions resulting from competition."

XLVII.

Neither the Common Law, Nor the Act to Regulate Commerce, Requires Equality of Charge Except Where the Services are Similar.

In the case at bar Judge Severens says: "Now I think that no one can read these schedules fixing the rates of through traffic from the seaboard to Chattanooga, and to Nashville and Memphis through Chattanooga, without being instantly and strongly impressed that there is something wrong in the principle on which such rates are adjusted, *and that the equality which the Commerce Act was enacted to secure* has been utterly disregarded."

Trans. p. 370.

Again he says: "If for such causes as existed here such *unequal* charges can be made along the same line of traffic the inevitable result must be that the Commerce Act will prove of no value, and the leading principle of the common law relating to the same general subject will be overthrown."

Trans. p. 373.

Neither the common law nor "the Commerce Act" requires "equality" of charge *except where the services are similar.*

In the case of I. C. C. vs. B. & O. R. R., 145 U. S., 275, Mr. Justice Brown, speaking for this Court, says:

"Prior to the enactment of the Act of February 4, 1887, to regulate commerce, commonly known as the Interstate Commerce Act, 24 Stat. 379, c. 104, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service (citing cases), though the weight of authority in this country was in favor of an *equality of charge* to all persons *for similar services.*"

It has been held by this Court in the "Import Case," as well as in the "Alabama Midland Ry. Case," and in the "Behlmer Case," that the service rendered by a carrier in the transportation of traffic to a competitive point is not "similar" to the service rendered in the transportation of traffic to a non-competitive point. Therefore a person shipping to a non-competitive point is not entitled to an "*equality*" of charge with one shipping to a competitive point.

In Ex Parte Koehler, 31 Fed. Rep , p. 321, Judge Deady said: "The places between which competition in transportation exists between water craft and railways, *or even the latter*, always will and must send and receive freight at lower rates than others not so favored. This is the result of natural advantage, supplemented often by exceptional sagacity and enterprise, and it would be folly in the Legislature to prevent it if it could. As long as people and places differ so widely in capabilities and facilities, social or business equality is impossible. Society can do no more than to give each one an even chance and a fair show to make the most of his or its opportunities, and leave the the result to circumstances over which it has little, if any, direct control."

In the case of Brewer & Hanleiter vs. Central of Georgia Railway Co. (84 Fed. Rep., p. 268), Judge Speer said:

"Shall government undertake the impossible but injurious task of making the commercial advantages of one place equal to those of another? It might as well attempt to equalize the intellectual powers of its people. There should be no attempt to deprive a community of its natural advantages, or of those legitimate rewards which flow from large investments in business industries, and competing systems of transportation to facilitate and increase commerce. The Act to Regulate Interstate Commerce has no such purpose, and yet this appears to be the inevitable result of the decree the complainants seek in the case, without any adequate corresponding advantage either to themselves or to the community in which they live."

If the law be that all persons are entitled to an "equality"

of charge, there is no use for the first section of the Act, which requires that rates be reasonable; nor for the second section of the Act, which prohibits unjust discrimination; nor for the third section of the Act, which prohibits undue preference; nor for the fourth section of the Act, which prohibits a greater charge for a shorter than for a longer distance, etc. If the law be that all rates shall be equal, or that all rates shall be equal in proportion to mileage, the first four sections of the Act are wholly unnecessary.

XLVIII.

The Act to Regulate Commerce did not Intend to Stifle Competition.

In the case at bar, Judge Severens says:

"If the fact of such competition is allowed to become a dominating factor in fixing the relative charges of transportation to the different places along the lines, those communities where there is no competition must be blighted by the disadvantage with which they are burdened and the favored places grow prosperous in the sacrifice of others." . . . . "With this as the rule in adjusting rates, it seems certain that the poor places must become poorer and the localities more sparsely settled than ever. At least this would seem to be the very probable tendency."

Trans. p. 373.

If the fact of competition is *not* to be allowed to operate as a *dominating* factor in fixing the relative charges for transportation, then it must be prohibited or stifled altogether. Because, if competition be allowed to operate *at all*, it *necessarily* becomes a *dominating* factor in fixing the relative charges for transportation to the different places along the line of a railroad.

As said by Judge Deady:

"The places between which competition in transportation exists between water craft and railways, *or even the latter*, always will, and must, send and receive freights at lower rates than others not so favored."

31 Fed Rep. 321, Ex Parte Koehler.

We are therefore confronted with the question as to whether it was the intention of Congress, in passing the Act to Regulate Commerce, to prohibit or stifle competition.

The fifth section of the Act, which prohibits pooling, is alone sufficient to show that Congress had no such intention. It expressly prohibits every contract, agreement or combination for pooling; a practice which is supposed by some to have a tendency to stifle competition.

In the case of I. C. C. vs. B. & O. R. R. Co., Mr. Justice Brown, speaking for this Court, said that:

"It was not the design of the act to stifle competition."
154 U. S., p. 281, I. C. C. vs. B. & O. R. R. Co.

If it was not the design of the Act to stifle competition, and if the necessary effect of competition is to enable those places between which competition exists to send and receive freight at lower rates than others not so favored, are the competing lines to be censured for the disadvantage under which those places labor at which no competition exists?

XLIX.

The Discrimination Which Exists in This Case Against Chattanooga Is Not Caused by Any Fault or Contrivance of the Appellants.

Judge Severens speaks of the shorter distance points as being "*blighted* by the disadvantage with which they are burdened."
Trans. p. 373.

Now, if it be conceded, for the sake of argument, that he is correct in describing them as "blighted," are the competing lines censurable for the "blighted" condition of those places?

The question is well answered by Judge Deady, as follows:

"It is not the fault or contrivance of the railway that compels this discrimination, but it is the necessary result of circum-

stances altogether beyond its control. It is not done wantonly, for the purpose of putting the one place up, or the other down, but only to maintain its business against rival and competing lines of transportation. In other words, the matter, so far as the railway is concerned, resolves itself into a choice of evils. It must either compete with the boats during the season of water transportation, and carry freight below what the Legislature declared to be a reasonable rate, or abandon the field and let its road go to rust."

23 Fed. Rep., 533, Ex Parte Koehler.

In another case Judge Deady said:

"Freight carried to or from a competitive point, is always carried under substantially *dis*similar circumstances and conditions from that carried to or from non-competitive points. In the latter case, the railway makes its own rates, and there is no good reason why it should be allowed to charge less for a long haul than for a short one. When each haul is made from, or to, a non-competitive point, the effect of such discrimination is to build up one place at the expense of the other. Such action is wilfully unjust, and has no justification or excuse in the exigencies or conditions of the business of the corporation. In the former case, the circumstances are altogether different. The power of the corporation to make a rate is limited by the necessities of the situation. Competition controls the charge. It must take what it can get or abandon the field, and let its road go to rust."

31 Fed. Rep., 319, Ex Parte Koehler.

L.

The Preference Which Exists in This Case in Favor of Nashville is not Caused by any Fault or Contrivance of the Appellants.

Judge Severens speaks of the longer distance points as "favored places;" and says they "grow prosperous in the sacrifice of others."

Trans. p. 373.

In what sense is the longer distance point, Nashville, "favored?" Is it favored in any other sense than that the Trunk Line rates have been extended to that point? If it be lawful and proper to extend the Trunk Line rates from New York to Pittsburg, or from New York to Columbus, or from New York to Cincinnati, or from New York to Louisville, or from New York to Evansville, or from New York to Cairo, why is it not lawful and proper to extend them from New York to Nashville?

If the Trunk Line Roads, in connection with the Louisville & Nashville Railroad, have acted legally and properly in extending the Trunk Line rates from New York to Nashville, have not the appellant lines, which reach Nashville through Chattanooga, the right to meet the Trunk Line rates at Nashville—provided the Nashville traffic pays them anything over the additional cost of its movement?

The distance from New York, via Bristol and Chattanooga, to Nashville, is, as I have shown above, precisely the same as the distance from New York, via Cincinnati, to Nashville, viz.: 1,052 miles.

The Commission finds and reports that the appellant lines, operating through Chattanooga, carry from 50 to 60 per cent. of the total tonnage moving from the North Atlantic Seaboard to Nashville.

Trans. p. 42.

It appears, therefore, that the appellants not only have as short a line from Nashville to New York, as the line via Cincinnati, but that appellants' facilities for transportation are such as to have enabled them to secure fully one-half of the competitive traffic moving between the North Atlantic Seaboard and Nashville. Is it possible that they are to be censured because they have seen proper to compete for the Nashville traffic? Suppose the appellants should enter into a contract, agreement or combination with the Trunk Lines and the Louisville & Nashville Railroad to pool the Nashville traffic, and, in that way (as is supposed), to stifle competition, they would commit an offense against the pooling section of the Act to Regulate Commerce; or

if the appellants should enter into any "trust arrangements" with the Trunk Lines and the Louisville & Nashville Railroad to control the rates at Nashville, they would render themselves amenable to the Anti-Trust Law.

166 U. S., p. 290, U. S. vs. Frt. Assn.

The appellants are therefore placed in this dilemma: If they enter into any contract, agreement or combination to stifle competition at Nashville, they violate one, and perhaps two, acts of Congress. If they compete with the Trunk Lines and the Louisville & Nashville R. R., in good faith, at Nashville (inasmuch as the necessary result of such competition is to force them to accept the same rates as the Trunk Line rates to Nashville), then, according to Judge Severens, they are guilty of "favoring" Nashville; which is but another way of saying that they give to Nashville an *undue* and *unjust* preference. It would seem, therefore, "that they are to be damned if they do, and to be damned if they don't."

LI.

Nashville Has Not "Grown Prosperous in the Sacrifice" of Chattanooga.

When Judge Severens speaks of "the favored places" growing "prosperous in the sacrifice of others," in what sense does he use the word "sacrifice"? Can anyone show, or will anyone undertake to assert, that prior to the extension of the Trunk Line rates to Nashville by the railroads whose lines reach Nashville through Cincinnati, the rates from New York to Chattanooga were lower than they are now? If the rates to Chattanooga were not lower then than they are now, how has Chattanooga been injured, in a legal sense, by the extension of the Trunk Line rates to Nashville? It may be said that Chattanooga has been injured, in a commercial sense, because the extension of the Trunk Line rates to Nashville has enabled Nashville to compete with Chattanooga in certain articles, in certain territory, which Nashville could not have reached, but for the reduction in her Eastern rates which resulted from the extension of the Trunk Line rates to that point. But the appellants did

not extend the Trunk Line rates to Nashville; and they are neither legally nor morally censurable for the extension of those rates to Nashville. Upon this point the Commission finds and reports that the railroads from the Atlantic Seaboard reaching Nashville by way of Cincinnati "established rates and united in joint tariffs from Eastern points to Nashville long before the lines through Chattanooga engaged in the Nashville business;" and that "the acceptance of the rates so fixed by the rail lines via Cincinnati was the necessary condition upon which the lines via Chattanooga could compete for Nashville traffic."

Trans. p. 49.

The Commission further finds and reports that "the Nashville rate is independent of the lines operating through Chattanooga, and those lines have no voice in determining its amount."

Trans. p. 49.

But, whoever may be to blame for the extension of the Trunk Line rates to Nashville, the commercial statistics of the two cities demonstrate that Nashville has not "grown prosperous in the sacrifice" of Chattanooga. The Commission finds and reports that "during the last ten years *especially*," the growth of Chattanooga "has been extremely rapid, and it has become a manufacturing and commercial point of considerable importance."

Trans. p. 47.

Appellee's witness, Magill, testified that according to the City Directory, which was issued June, 1897, Chattanooga, with its immediate suburbs, had a population of about 49,000; that there were from fifty-five to sixty manufacturing establishments, and some twenty-five or thirty jobbing establishments.

Trans. p. 242.

"According to the United States Census, the population of Nashville increased from 16,988 in 1860 to 25,865 in 1870, which was an increase of 52 per cent. During the same decade, the population of Chattanooga increased from 2,545 to 6,093, which was an increase of 139 per cent.

The population of Nashville increased from 25,865 in 1870 to 43,350 in 1880, which was an increase of 67 per cent. During the same decade, the population of Chattanooga increased from 6,093 to 12,892, which was an increase of 111 per cent.

The population of Nashville increased from 43,350 in 1880 to 76,168 in 1890, which was an increase of 75 per cent. During the same decade, the population of Chattanooga increased from 12,892 to 29,100, which was an increase of 125 per cent.

During the three decades from 1860 to 1890, the average increase of population at Nashville was only 65 per cent., while during the same period the average increase of population at Chattanooga was 125 per cent.

These figures demonstrate that while the Trunk Line rates to Nashville may be less than the Southern rates to Chattanooga, yet the latter are so adjusted with reference to the other twenty-four Southern cities, with which she is grouped, that they have enabled Chattanooga to increase in population very much more rapidly than Nashville. It is therefore manifest that Nashville has not "grown prosperous in the sacrifice" of Chattanooga.

One of appellants' witnesses (Merriam) testifies that during the last ten years the *wholesale* business at Chattanooga has declined.

Trans. p. 253.

The fact that the *wholesale* business has declined in Chattanooga during the last seven years proves nothing. Jobbers and manufacturers, by shipping in carloads to large distributing points, like Chattanooga, can sell in less than carloads to retail merchants, delivering the goods direct from the cars into the retail stores; and thus dispense with the wholesale merchant entirely. Where goods can be handled in that way, in carload lots, at large distributing points, it is quite natural that the wholesale business, being no longer useful, should die out at Chattanooga, as well as elsewhere.

The Commission has recently considered the subject of ship-

ping in carloads, and selling in less than carloads, and in relation thereto, said:

"Other and unusual advantages are also realized through opportunities so afforded to favorably fill orders from such stores; to often sell small lots of goods delivered at destination without paying less than carload charges thereon, except upon reshipment from the point of concentration; to have the railway agent, or the warehouse manager under railway control, act as his forwarding agent without charge; *to compete with wholesale merchants in various sections without the cost of warehousing, cartage, and some other expenses necessarily involved in the carrying on of a locally established enterprise.*"

American Warehousemen's Association vs. I. C. R. R. Co. et al., 7 I. C. Rep., p. 562.

Appellee's witnesses state that when the prices in one place are higher than those in another because of discrimination in freight rates, or any other such cause, the sales made in the former will fall off in comparison with those made in the latter.

Trans. p. 242.

There is no discrimination in freight rates as between Chattanooga and the other twenty-four Southern cities with which she is grouped; because they all have the same Eastern rail and water rates. The discrimination which exists is as between those cities and Nashville. And though it may tend to the injury of Chattanooga in her competition with Nashville, *it is a discrimination not caused by the appellants.* They do not make the lower rates to Nashville; they do not even have a voice in determining those rates. The Trunk Lines and the Louisville & Nashville Railroad make those rates; and the appellant carriers must either accept them, or abandon the Nashville traffic.

If the Eastern rates to Chattanooga should be reduced, the same reduction would have to be made in the Eastern rates to the other twenty-four Southern cities with which she is grouped; and, therefore, the only increase of traffic which Chattanooga could expect from the reduction would be confined to that ter-

ritory in which she, and the other twenty-four Southern cities grouped with her, compete as against Nashville.

Appellee's witnesses state that low rates to a locality increase the commercial trade, and induce men to invest capital in business; that the greater the number of business houses, the greater the number of employes and of population; and that they advance the prosperity of a place in every respect.

Trans. p. 252.

What the witnesses intended to say is, that where one locality has rates which are preferentially low, as compared with the rates of a competing locality, the prosperity of the former will be advanced, etc.; because, if all the competing localities have equally low rates, there is no reason why one of them should increase in population or prosperity more rapidly than the others.

If increase in population is an evidence that a city has enjoyed preferentially low rates, then the wonderful increase in the population of Chattanooga, as compared with the increase in the population of Nashville referred to above, would indicate that Chattanooga, and not Nashville, has been in the enjoyment of preferentially low rates.

But if it were true that Eastern rates to Nashville are preferentially low, the appellants are neither censurable nor responsible for it. They do not make those rates; they are not even consulted as to what they shall be. Those rates are made by the Trunk Lines and the Louisville & Nashville Railroad; and the appellants must either accept them or abandon the Nashville traffic.

Appellee's witnesses state that relatively high rates to a locality, or rates which discriminate against a locality, have a tendency to retard its growth and prosperity; that they retard business in every respect, both manufacturers and merchants.

Trans. p. 246.

The increase in Chattanooga's population, as compared with the increase in Nashville's population, would indicate that Chat-

tanooga's rates, are *not* "relatively high." If, however, it were true that the difference in rates discriminates against Chattanooga, the appellants are not responsible for it. The appellants' rates from New York and other Eastern cities to Chattanooga are just and reasonable, in and of themselves; and such discrimination as exists against Chattanooga results alone from the fact that the Trunk Lines and the Louisville & Nashville Railroad, without consulting the appellants, and without even allowing them a voice in the matter, have seen proper to put into effect the present low line of Eastern rates to Nashville; which rates the appellants must accept or abandon the Nashville traffic.

LII.

The Great Length of Time During Which the Present Rate Adjustment Has Existed is Evidence That it is Right.

Appellee's witnesses differ as to the length of time during which the rates from the East to Chattanooga have been materially higher than the rates from the East to Nashville. They vary in their statements as to the time, from eight to twenty-five years.

Trans. pp. 254, 246.

When it is remembered, that so far as the records show, this is the first complaint that has ever been made by Chattanooga merchants of the rate adjustment from New York and other Eastern cities to Chattanooga, and to the other twenty-four Southern cities which have the same rail and water rates from the East as Chattanooga, the great length of time during which that adjustment has existed is strongly persuasive, if not absolutely convincing, that it is right The appellants' lines which serve Chattanooga and the other twenty-four Southern cities, with which she is grouped, would not have submitted, for so long a time, to an adjustment which fixes rates from the East to those cities materially higher than rates from the East to Nashville, unless the appellants' lines were satisfied that it was impossible to force the Trunk Lines and the Louisville & Nashville Railroad to in-

crease the Eastern rates to Nashville; and unless the appellants' lines were also satisfied that they could not reduce their own rates to Chattanooga, and the other twenty-four Southern cities with which she is grouped, without incurring a loss of revenue which they could not afford to sustain.

LIII.

Chattanooga and Other Shorter Distance Points Have not "Become Poorer."

Judge Severens, speaking of the rule of charging less for a longer than for a shorter distance, where competition compels the lower charge to the longer distance point, says:

"With this as the rule in adjusting rates, it seems certain that the poor places must become poorer and the localities more sparsely settled than ever."

Trans. p. 373.

It is true that the density of population and of traffic is much greater in the States north of the Ohio and east of the Mississippi Rivers than it is in the States south of the Ohio; but the fact may be accounted for in many ways, other than by ascribing it to the difference which it is claimed exists in the method of rate-making in the two territories. The prejudice against slavery which was entertained by all Europe prevented European immigration to the South and induced it to the North. Among the immigrants were numerous skilled mechanics and miners, who developed the mining and manufacturing industries of the North; while the South remained, until after the war, an exclusively agricultural country. Since the war, the industries of the South have become more diversified; and the local non-competitive stations in the South have prospered, since the war, in a ratio corresponding with similar non-competitive stations in the North.

It is to the pecuniary interest of every railroad to develop the traffic of its local stations; and, by that process of development, such stations gradually increase in population, manufactures,

etc., until they become so large as to invite the construction of other railroads; and in time they develop into competitive points. The process is gradual, and necessarily slow; but it is a *natural* process of evolution. The Commission, however, is not content to await the operation of natural causes; and it proposes, by an artificial process, to place non-competitive stations upon an arbitrary equality with the competitive stations. It is contended that such arbitrary process of leveling the railroad rates of the country is not only authorized, but required, by the Act to Regulate Commerce. On the contrary, Judge Deady said:

"Congress never intended to make of this Act a Procrustean bed, in which the conduct of the business of all the roads engaged in interstate commerce shall be made to conform to one arbitrary rule, without reference to the probable and even unavoidable difference in the conditions and circumstances under which it must be transacted."

31 Fed. Rep., pp. 320, 321, Ex Parte Koehler.

LIV.

The Reduction of Rates to Chattanooga Would Not Increase Either the Tonnage or the Revenue of the Appellant Lines.

In the case at bar Judge Severens says:

"I am very strongly inclined to the belief that their (the carriers') interests would, in the long run, be better promoted by adhering more closely to the rules of the statute than was done in the present case, or is likely to be done under the practice which their counsel endeavors to justify."

Trans. p. 373.

The practice to which Judge Severens refers is that of charging less for a longer than for a shorter haul where competition compels the acceptance of lower rates at the longer distance point. His Honor's idea is that if the shorter distance point were not charged more than the longer distance point, the traffic of the

shorter distance point would be increased, and, in that way, the carrier's revenue would be increased.

His Honor's opinion upon any question of *law* is entitled to the highest respect; for he is one of the most eminent jurists of the country. His opinion, however, as to the probable effect of any particular mode of rate-making is, of course, the opinion of one who has not had a very extended experience in traffic matters. But whatever weight may be given to his opinion upon the subject, his suggestion involves an experiment, the entire expense of which would have to be borne by the carriers. A similar suggestion was pressed upon Mr. Justice Brewer in the case of Chicago & N. W. Ry. Co. vs. Dey, and in reply thereto he said:

"Again, it is said that it cannot be determined in advance what the effect of the reductions will be. Oftentimes it increases business, and who can say that it will not in the present case so increase the volume of business as to make it remunerative, even more so than at present? *But speculations as to the future are not guides for judicial action.* Courts determine rights upon existing facts. Of course, there is always a possibility of the future; good crops may increase transportation business, poor crops reduce; high or low rates may likewise affect; but the only fair judicial test is to apply the rates to the business that has been done in the past, and see whether upon that basis such rates will be remunerative, or compel the transaction of business at a loss."

35 Fed Rep., p. 881, Chicago & N. W. Ry. Co. vs. Dey.

If the government of the United States desires to conduct experiments in railroad rate-making, as it has a perfect right to do, it should either defray the expense of such experiments, or guarantee the companies against loss resulting therefrom. If the government should see proper to exercise its right of eminent domain by appropriating the interstate railroad property of this country to its own use, I have every reason to believe that the owners of railroad property would be more than willing to surrender the railroads to the government, at anything like a fair valuation. But so long as the government insists upon the railroads being operated by their owners, the owners ought not to

be forced to undertake costly experiments in rate-making which, in the opinion of experienced traffic managers, would result in disastrous failure.

It is fair to assume that the traffic managers of the Southern railroads, who are men of long and varied experience, and some of them of world-wide reputation, are competent judges as to what line of conduct would most tend to increase the revenues of their companies; and the financial condition of Southern railways is such as to justify us in assuming that their traffic managers have every motive to increase their revenues.

Counsel for the appellee in argument, in the Court below, quoted from an opinion of Hon. Aldace F. Walker, formerly a member of the Commission, in which Mr. Walker expressed the same view as Judge Severens. But it is proper to say that neither Mr. Walker nor Judge Severens has ever had any experience in the operation of railroads in Southern territory. A line of conduct which might be eminently wise in Trunk Line territory, where population and traffic are very dense, might be eminently unwise in Southern territory, where the population is sparse; and the volume of traffic, which is light, is scattered at long intervals, through large sections of country, some of which are incapable of supporting even the few people who inhabit them.

Sometimes a reduction in rates will increase the consumption of certain articles, and in that way increase the traffic, and, consequently, the revenue of the railways carrying the traffic. But it is by no means true in all cases. In fact, it is true in no case, except where the rate charged for transportation represents so large a proportion of the market value of the article transported, *that it is practicable for the merchant who sells the article to give the consumer the benefit of the reduction.* To illustrate my meaning:

Appellee's witnesses testify that transportation rates or charges enter into and affect the prices at which Chattanooga merchants *can* sell goods to consumers.

Trans. p. 244. Answer to 9th interrogatory.

The difference between the Eastern rates to Chattanooga, and

the Eastern rates to Nashville, is the following, in cents per hundred pounds, viz:

Classes	1	2	3	4	5	6
	23	20	26	31	24	18

Trans. p. 42.

It will be seen that the greatest difference is in the rate on 4th class; and that the difference on that class amounts to 31 cents per hundred pounds.

Among other articles in the 4th class is coffee.

Trans. p. 230.

A difference of 23 cents per hundred pounds on coffee amounts to less than 2½ mills per pound; and to a consumer purchasing ten pounds of coffee for domestic use, the difference would amount to less than 2½ cents.

The difference in first class rates is 23 cents per hundred pounds.

Dry goods are first class.

Trans. p. 230.

On a hat weighing 6 ounces, a difference of 23 cents per hundred pounds would amount to only 86-1000 of a cent.

It is manifest, therefore, that a difference in rates such as exists in the case at bar, while it may be quite important *as affecting the profits of the merchants, is, in most instances, of no importance at all, so far as the consumer is concerned.*

Witness Smith states that the excess of Chattanooga over Nashville rates, from the East, is, in dollars and cents per carload of 24,000 pounds, the following, viz.:

Classes	1	2	3	4	5	6
	$55.20	$48.00	$62.40	$74.40	$57.60	$43.20

Trans. p. 232.

The profits of a wholesale merchant at Chattanooga as compared with the profits of a wholesale merchant at Nashville are, *when purchases are made in carload lots*, affected to the extent of the figures shown.

But consumers do not purchase in carload lots. And though the difference, when looked at from the standpoint of a wholesale merchant when he purchases in carload lots, seems quite great, yet, when looked at from the standpoint of a consumer who purchases in ordinary quantities, the difference is so infinitesimal that it is impossible for the retail merchant to make the change so as to give the consumer the benefit of the difference, even if the merchant is disposed to do so.

When reduced to its last analysis, this proceeding is nothing more than an application upon the part of wholesale merchants at Chattanooga to increase their profits at the expense of the appellant carriers.

Counsel for the appellee, however, insisted in argument, in the Court below, that even though the reduction may inure to the benefit of the merchant alone, the merchant is a part of the public, and as such, is entitled to have the reduction ordered in his interest. It must be remembered, however, that the owners of railroad property are also a part of the public, and that their interests are entitled to some consideration. It seems to be a popular idea that whenever a merchant desires to increase his line of profit, all he has to do is to apply to a Railroad Commission, either State or Federal, to have his profits increased by diminishing the profits or dividends of railroad stockholders. Upon this point, in the case of Ricketts, Smith & Co. vs. Midland Ry. Co., Law Rep. (1896), 1 Q. B., p. 266, the English Railway Commission, speaking through Collins, J., said:

"I think, therefore, that the reasonableness of the rate *is not to be tried by its effect upon the trade of the persons who have to pay it.* It may be a prudent thing for a carrier to tempt traffic by charging rates much lower than he would reasonably be justified in demanding, having regard to the elements which I have referred to as primarily affecting the reasonableness of the rate; but this is a question of railway management, which, in my judgment, lies outside our province. *Within these limits he is entitled to get as much as he can, even though he thereby diverts a large part of the merchant's profit into his own pocket.*

Appellee's witnesses state that a reduction in the rates on goods of all classes from New York and other Eastern cities to Chattanooga, so as to make the Chattanooga rates not higher than the rates to Nashville, would enable the Chattanooga *jobber* to name lower prices to his customers.

Trans. p. 248 Ans. to Interrogatory 10.

Such a reduction would enable Chattanooga *jobbers* to name lower rates to wholesale merchants; and it would perhaps enable Chattanooga *wholesale* merchants to name lower rates to retail merchants; but as just shown, *it would not have any appreciable effect upon the price paid by the consumer.* The question at last is, whether the appellant carriers shall be compelled to reduce their Chattanooga rates, if they are just and reasonable in and of themselves, merely to increase the profits of Chattanooga *jobbers* and *wholesale* merchants.

Appellee's witnesses state that a reduction in the rates on all classes of goods from New York and other Eastern cities to Chattanooga, so as to make them not higher than the rates to Nashville, would enable Chattanooga merchants to compete with Nashville merchants at all points and sell a greater volume of goods; and that this would increase the tonnage of the appellant carriers.

Trans. p. 249 Ans. to Interrogatory 12.

The argument sought to be deduced from the opinion thus expressed by the witnesses is, that the appellants' tonnage would be so increased that they would realize more net revenue from the Chattanooga traffic, at the reduced rates, than they realize from it at the present rates.

It is manifest, however, that the only effect of the reduction would be to divert a certain amount of tonnage from Nashville to Chattanooga, and the other twenty-four Southern cities with which Chattanooga is grouped; and therefore, while it would be a *diversion* of tonnage, it would not be an *increase* of tonnage. No reduction of rates can cause an *increase* of tonnage *unless it be so great as to reach the consumer*, and confer upon *him* a practical benefit.

I have shown above that the reduction contended for would amount to less than 2½ cents upon ten pounds of coffee, and less than 2½ mills upon one pound of coffee; I have also shown that it would amount to only 86-1000 of a cent upon a hat. No one would drink more coffee, or wear more hats, because of such infinitesimal reductions in the prices of those articles. Unless rereductions in rates are so great *as to induce consumers to use more of the articles* upon which the reductions are made, there can be no *increase* of tonnage produced by such reductions.

LV.

It is Not a Proper Function of Government to Attempt to Equalize Either the Business Facilities or Social Relations of Communities.

In the case at bar, Judge Severens, in commenting upon the practice of charging less for the longer than for the shorter haul, where competition compels the acceptance of lower rates at the longer distance point, says:

"And public policy would also be advanced by the opposite course, not only in the encouragement which would thus be given to the distribution of commerce and population, but also in extending that *equality* of privilege which it is one of the prime objects of legislation to promote."

Trans. p. 373.

I have hereinbefore shown that neither the common law nor the Act to Regulate Commerce requires "*equality* of privilege," except where the services are similar; and I shall have nothing further to say upon that point. But as to Judge Severens' suggestion that public policy would be advanced by building up one place at the expense of another, I submit that it is no proper function of government to deprive any place of the commercial advantages which it enjoys. When Judge Severens says that public policy would be advanced in the "encouragement which would thus be given to the distribution of commerce and population," he can mean nothing

else than that the commerce and population of Nashville ought, at least to a certain extent, to be taken away from it and given to Chattanooga. In reply, I repeat the language of Judge Deady, that:

"As long as people and places differ so widely in capabilities and facilities, social or business equality is impossible. Society can do no more than to give to each one an even chance and a fair show to make the most of his or its opportunities, and leave the result to circumstances over which it has little, if any, direct control."

31 Fed. Rep., 321, Ex Parte Koehler.

I also repeat the language of Judge Speer:

"There should be no attempt to deprive a community of its natural advantages, or of those legitimate rewards which flow from large investments in business industries, and competing systems of transportation to facilitate and increase commerce."

Brewer & Hanleiter vs. Central of Georgia Ry., Speer, J., 84 Fed. Rep., p. 268.

LVI.

The Argument That as There are More Railroads at Chattanooga Than at Nashville, the Chattanooga Rates Should be Lower Than the Nashville Rates.

Counsel for appellee, in his argument in the Court below, and Judge Severens, in his opinion, alluded to the fact that there are more railroads entering Chattanooga than enter Nashville; and counsel insisted that if competition has the effect to reduce rates, the rates from New York and Eastern cities to Chattanooga ought to be lower than the rates to Nashville, instead of being higher as they are.

It is true that more railroads enter Chattanooga than enter Nashville.

It is also true that some of the railroads which enter Chattanooga are in active competition with each other. And it is by

reason of that fact that the rates from New York and other Eastern cities to Chattanooga are as low as they are. If the rates from New York and other Eastern cities to Chattanooga were made the sum of the local rates of the various carriers whose lines go to make up the through routes from New York to Chattanooga, they would probably be three times or perhaps four times as high as they are. It is the competition between those carriers, and the competition between Chattanooga and various other cities in Southern territory, that has caused the rates to Chattanooga to be as low as they are.

As stated above, Chattanooga has the same rail and water rates from New York and other Eastern cities as Atlanta, and twenty-three other cities located in Southern territory. Those rates have been fixed without regard to the distance from New York to those cities, severally. The rates were fixed upon the theory that as those cities competed with each other in the same territory, it was necessary that they should have the same rates, or the traffic would be diverted from one to the other. The carriers serving those cities, respectively, insisted upon their being allowed equal rates from New York and other Eastern cities. They made their insistence effective by rate wars, waged from time to time in the past; and frequently with disastrous results to the carriers, as well as the cities involved in them.

The rates in the territory in which Chattanooga is located have not only been reduced by competition between the various rail carriers serving the various competitive cities in that territory, but they have also been materially influenced by water competition.

The Interstate Commerce Commission in its First Annual Report, speaking of that territory, said:

"A study of the conditions under which railroad traffic in certain sections of the country has sprung up is necessary to an understanding of the difficulties which surround the subject. The territory bounded by the Ohio and the Potomac on the north, and by the Mississippi on the west, presented to the Commission an opportunity, and also an occasion, for such a study.

The railroad business of that section has grown to be what it is in sharp competition with water carriers, who not only have had the ocean at their service, but by means of navigable streams were able to penetrate the interior in all directions."

First Annual Report Interstate Commerce Commission (1887), p. 16.

Chattanooga has obtained the full benefit of all those competitive conditions in the rates which she now enjoys from the East; and she does not understand why Nashville, with only two railroads, should have succeeded in obtaining lower rates from New York and other Eastern cities than Chattanooga has obtained.

A moment's reflection, however, will enable us to understand the matter. I have above repeatedly referred to the finding of the Commission that the rates from New York, via Cincinnati, to Nashville are made by the Trunk Line roads from New York to Cincinnati, and the Louisville & Nashville Railroad from Cincinnati to Nashville. The distance from New York to Cincinnati is 757 miles; the distance from Cincinnati to Nashville is 295 miles; and the distance from New York via Cincinnati to Nashville is 1,052 miles. It will be seen, therefore, that the Trunk Line mileage from New York to Cincinnati represents 75 per cent. of the total mileage from New York, via Cincinnati, to Nashville.

Trans. p. 45.

The Trunk Line rates from New York to Cincinnati are the result of competition between the various rail lines running from New York and other Eastern cities to Chicago, St. Louis, Indianapolis, Cincinnati, Louisville, Evansville and other Western cities. That competition has resulted in extremely low rail rates between all points in Trunk Line territory; and the vast volume of traffic has enabled the railroad carriers in that territory to accept the low rates which such competition has forced upon them, and yet, in some few instances, to escape financial ruin.

Although Nashville is not located in Trunk Line territory, it has obtained the benefit of the low Trunk Line rates prevailing

between New York and Cincinnati, as fully as though Nashville were located upon the Ohio River. In other words, traffic shipped from New York, via Cincinnati, to Nashville, is carried by the Trunk Lines from New York to Cincinnati, at precisely the same rate as if it were destined to stop at Cincinnati.

Trans. p. 42.

Nashville, having received the benefit of the low Trunk Line rates for 75 per cent. of the entire distance from New York to Nashville, has the further advantage of being an important commercial centre located at the intersection of the Louisville & Nashville Railroad with the Cumberland River, and the Nashville, Chattanooga & St. Louis Railway.

The Louisville & Nashville Railroad is interested in maintaining the commercial importance of Nashville as related to that of Cincinnati, Louisville, Evansville and Memphis. This cannot be done, unless Nashville is given such rates from New York and other Eastern cities as will enable Nashville to compete with Cincinnati, Louisville and Evansville in the territory between Nashvillle and the Ohio River; and to compete with Memphis in the territory between Nashville and the Mississippi River. The rates from New York and other Eastern cities to Nashville are already higher than the rates to Cincinnati, Louisville and Evansville, (Trans. p. 42); and if the rates to Nashville were made any higher than the present rates, it would be utterly impossible for Nashville to compete with either one of those three cities. (Trans. p. 127; Ans. 12). The testimony of Mr. van den Berg and of Mr. Gallagher, taken in the Circuit Court, proves the additional fact that if the rates from New York and other Eastern cities to Nashville were materially increased a portion of the traffic would be diverted from the Louisville & Nashville Railroad to steamboats plying between Evansville and Nashville.

Trans. p. 127. Ans. No. 11; p. 135. Ans. 24; pp. 210, 211.

The Commission found as a fact that there is no actual competition at the present time by water at Nashville. The Commission restricted its findings in regard to water competition at Nashville to boats plying between *Cincinnati* and Nashville.

(Trans. pp. 48, 49, 50.) The testimony shows, however, that the distance from Evansville to Nashville, by water, is less than one-half the distance from Cincinnati to Nashville, by water. (Trans. p. 178.) And whatever may be the potentiality of water competition from *Cincinnati* to Nashville, the testimony of van den Berg and Gallagher shows that if the Louisville & Nashville Railroad should attempt to materially increase the rates from New York and other Eastern cities to Nashville, the danger of diverting Eastern traffic to steamboats plying between *Evansville* and Nashville is so great that no prudent traffic manager of the Louisville & Nashville Railroad would dare to make the attempt. It is the combined operation of the causes above mentioned which has resulted in the rates from New York and other Eastern points to Nashville being lower than the rates to Chattanooga; notwithstanding only two railroads enter Nashville.

It is evident that the Louisville & Nashville Railroad would, if it could, increase the proportions which it now receives out of the rates from New York and other Eastern cities to Nashville. Manifestly it does not accept those low proportions out of any mere love or preference for Nashville. That corporation is not chartered for charitable purposes; and it is not generally supposed to be actuated by motives of mere benevolence. There must be some sensible business reason why that company accepts such low proportions of the Eastern rates to Nashville. And Mr. van den Berg, its traffic manager, tells us the reason is that if that company should demand higher proportions, and thereby increase the aggregate rates from New York to Nashville, it would, in the first place, prevent Nashville from competing with Louisville and Evansville (Trans. p. 127; Ans. No. 12); and in the second place, divert a portion of the traffic from the Louisville & Nashville Railroad to steamboats plying between *Evansville* and Nashville. In other words, Eastern freight would be shipped via the Trunk Line roads from New York to Evansville, instead of being shipped via the Trunk Line roads from New York to Cincinnati; and when the freight reached Evansville, a portion of it would go from Evansville to Nashville by river instead of via rail.

Trans. p. 127, Ans. No. 11; p. 135, Ans. No. 24.

Mr. van den Berg has no motive to misrepresent the matter; while he has every motive and every opportunity to understand fully the effect that would result from increasing the Eastern rates, via Cincinnati, to Nashville. The opinion which he has expressed, to the effect that an increase in the Eastern rates to Nashville would divert a portion of the Eastern traffic from his line to steamboats plying between Evansville and Nashville, is corroborated by Mr. Gallagher, the general freight and passenger agent of the steamboat company which operates a line of boats between those cities, who states what rates his company would be willing to accept on Eastern traffic; and that a sufficient amount of steamboat tonnage could be obtained to move it.

Trans. pp. 172, 173–176.

LVII.

The Argument That There is no Real Competition at Chattanooga; and That This is the Reason Why the Chattanooga Rates are Higher Than the Nashville Rates.

The Commission found as a fact that the rates to Chattanooga, and the twenty-four Southern cities with which Chattanooga is grouped for rate-making purposes, were established by the Southern Railway & Steamship Association, of which the appellant lines were members.

Trans. p. 48.

Upon this fact, as found by the Commission, counsel based an argument in the Court below, that there is no real competition at Chattanooga; because the competition is conducted under rates, which, as he contends, but I deny, are agreed upon by the various lines that enter Chattanooga.

There can be no permanent competition between rail carriers that will not be absolutely destructive of all public interests, unless such competition can be conducted under rates which are substantially the same by all of the competing lines. A merchant, A, who ships his freight from New York to Chicago, via the New York Central Railroad, must have substantially the

same rates as his rival, B, who ships the same kind of freight from New York to Chicago, over the Pennsylvania Railroad; or his rival, C, who ships the same kind of freight from New York to Chicago, over the Erie Railroad; or his rival, D, who ships the same kind of freight from New York to Chicago, over the Baltimore & Ohio Railroad.

It is impossible, however, for those four Trunk Line railroads to use the same rates unless each knows what rates the others are charging. And the mere fact that competition may be conducted under rates which are known to all of the competitors does not prevent the competition from being real and effective.

LVIII.

The Argument that the Louisville & Nashville Railroad Company has Used its Power as a Majority Stockholder in the Nashville, Chattanooga & St. Louis Railway to Favor Nashville to the Detriment of Chattanooga.

A stipulation by counsel has been filed in this case, in which it is agreed that the capital stock of the Nashville, Chattanooga & St. Louis Ry. is $10,000,000.00, and is represented by 100,000 shares. That the Central Trust Company of New York, as trustee, holds 55,005 shares of said stock, in trust for the Louisville & Nashville Railroad Co.; and that said stock was purchased March 1, 1882. That said Louisville & Nashville Railroad Co., for the fiscal year ending June 30, 1896, received as income or dividend on account of said stock, $220,060.00. That the affairs of said Nashville, Chattanooga & St. Louis Ry. are managed by a Board of Directors consisting of fifteen members, who are chosen by the stockholders from their own body; that the President of the company is elected by the directors from among their own number; and that in all elections for directors each share of stock is entitled to one vote.

It is further agreed in said stipulation that J. W. Thomas, President; Geo. R. Knox, General Freight Agent, and W. L.

Danley, General Passenger Agent of the Nashville, Chattanooga & St. Louis Railway; and M. H. Smith, President; S. R. Knott, First Vice President, and Y. van den Berg, Traffic Manager of the Louisville & Nashville Railroad Co., would testify to the following as facts; and that the same may be considered by the Court, as if the depositions of said witnesses had been duly taken in this case, and they had testified thereto. Said facts are as follows: That the Nashville, Chattanooga & St. Louis Railway is a separate and distinct railway corporation; that it is managed and operated separately and apart from the Louisville & Nashville Railroad Co.; and is managed and operated by a separate and distinct corps of officers, employes and servants. That the officers of the Nashville, Chattanooga & St. Louis Railway make the rates upon their different lines and branches according to their own policy and best judgment, and not under the direction, advice or supervision of the officers of the Louisville & Nashville Railroad Co. That the entire management of the Nashville, Chattanooga & St Louis Railway is under the control of a separate and distinct corps of officers and employes, from the President down; whose salaries are paid by the Nashville, Chattanooga & St. Louis Railway That the Nashville, Chattanooga & St. Louis Railway has a separate and distinct Board of directors from that of the Louisville & Nashville Railroad Co. *That the Nashville, Chattanooga & St. Louis Railway is an active and actual competitor of the Louisville & Nashville Railroad for traffic at all points where it comes in competition with the Louisville & Nashville Railroad.* That the Nashville, Chattanooga & St. Louis Railway competes as aggressively with the Louisville & Nashville Railroad for all traffic where it comes in competition with said company, as it does with any other railroad, or common carrier, for traffic at competitive points. That the Nashville, Chattanooga & St. Louis Railway *is an actual and active competitor with the Louisville & Nashville Railroad, for all traffic from Boston, New York and other Eastern cities, destined to Memphis and Nashville, Tenn.*

Trans. pp. 258, 259.

The fact that the Nashville, Chattanooga & St. Louis Ry. is an actual and active competitor with the Louisville & Nashville Railroad, for all traffic from Boston, New York and other Eastern

cities, destined to Memphis & Nashville, is further proven by the testimony of appellee's own witnesses wherein they state that the bulk of the traffic, from New York and other Eastern cities, destined to Nashville, *comes through Chattanooga*, and not through Cincinnati.

Trans. pp. 249, 252, 254. Answer to Int. 19.

From Chattanooga to Nashville, the traffic necessarily passes over the Nashville, Chattanooga & St. Louis Railway; whereas from Cincinnati to Nashville, it necessarily passes over the Louisville & Nashville Railroad.

While the Louisville & Nashville Railroad Co., as the majority stockholder, may be said to get the benefit of $\frac{55}{100}$ of the revenue which the Nashville, Chattanooga & St. Louis Ry. receives from the carriage of Eastern freights from Chattanooga to Nashville, yet if the Louisville & Nashville Railroad Co. could divert to its own line, via Cincinnati, such of those freights as have heretofore been carried by the Nashville, Chattanooga & St. Louis Ry., *it would get all of the revenue, instead of getting only* $\frac{55}{100}$. It is manifest, therefore, that there is competition of the most active and effective character between the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Ry. for the carriage of Eastern traffic to Nashville.

Mr. Knox testifies that there was a time when perhaps 90 per cent. of the business reached Nashville through Cincinnati, Louisville, and other Northern gateways; but for a number of years past the bulk of this traffic has passed through Chattanooga.

Trans. p. 206.

It would seem, therefore, that not only has the competition between the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway, for the carriage of Eastern traffic to Nashville, been actual and aggressive, but so much so that the Nashville, Chattanooga & St. Louis Railway and its connections have succeeded in wresting from the Louisville & Nashville Railroad and its connections a very material proportion of the traffic.

It would also seem to be very unjust to compel the Nashville, Chattanooga & St. Louis Railway, after its protracted and successful struggle with its rival, to abandon a traffic from which it realizes from $20,000 to $25,000 per annum.

It is doubtless true that the rates realized by the Nashville, Chattanooga & St. Louis Railway from that traffic yield only a small margin of profit over the additional cost of moving the traffic; but whatever the profit may amount to, it is that much revenue which goes to pay the company's operating expenses.

While the Louisville & Nashville Railroad is interested in maintaining the present rates from New York, *via Cincinnati*, to Nashville, so as to protect Nashville in its relations to Cincinnati, Louisville, Evansville and Memphis, it is not interested in having as low rates charged from New York, via Chattanooga, to Nashville, as are charged *via Cincinnati*. The Louisville & Nashville Railroad doubtless has ample transportation facilities to carry every pound of traffic that moves from New York and other North Atlantic points to Nashville; *and it is interested in having all of that traffic carried via Cincinnati to Nashville.* It is 294 miles from Cincinnati to Nashville, via the Louisville & Nashville Railroad; whereas it is only 151 miles from Chattanooga to Nashville via the Nashville, Chattanooga & St. Louis Railway. If the traffic be carried from New York *via Cincinnati*, the Louisville & Nashville Railroad gets a haul of 294 miles, and it receives *all* of the revenue realized from that mileage. Whereas if the traffic be carried from New York, via Chattanooga, the Nashville, Chattanooga & St. Louis Railway gets a haul of only 151 miles, and the Louisville & Nashville Railroad gets the benefit of *only* 55-100ths of the revenue received from that mileage.

The Louisville & Nashville Railroad, in agreeing with the Trunk Line roads to extend the Trunk Line rates to Nashville and Memphis, was not actuated by any motive to injure Chattanooga. Its sole motive was to protect Nashville as related to Cincinnati, Louisville, Evansville and Memphis.

I have shown that for many years, for rate-making purposes, Chattanooga has been grouped with twenty-four other Southern cities lying in the States of Georgia, Alabama and Mississippi (Trans. 48); and on Diagram No. 4 (See ante p. 16) I have shown the geographical relation which exists between Chattanooga and those cities. They may be said, speaking generally, to lie on and south of the Tennessee River and east of the Mississippi River. On the other hand, Nashville has been, for many years, for rate-making purposes, considered as related to Cincinnati, Louisville, Evansville and Memphis.

Nashville and those cities may be said, speaking generally, to be Ohio, Cumberland and Mississippi River points. For rate-making purposes, each of these river points must be protected as against the other. Their respective commercial interests are almost exclusively confined within their own group, and they have but little concern with the group to which Chattanooga belongs. It is true that there is a narrow strip of territory between Nashville and Chattanooga in which the Nashville group may be said to compete with the Chattanooga group, and vice versa. But the main interests of the Nashville group lie north and west of Nashville; and the main interests of the Chattanooga group lie south, southwest and southeast of Chattanooga.

The Nashville group is served by carriers whose lines extend from New York via Cincinnati, Louisville, Evansville, and other Ohio River gateways to the South.

The Chattanooga group is served by a totally distinct set of carriers, whose lines extend from New York, via the Virginia and South Atlantic gateways, to the South.

The carriers who serve the Nashville group are dominated by the Trunk Line Association, which fixes the rates all the way from New York to the Ohio River.

The carriers who serve the Chattanooga group have no connection with the Trunk Line Association, and are entirely independent of its operation.

These different sets of carriers have different systems of classification, and unlike methods of rate construction; and it is to those differences that the Commission refers, when it says:

"It is inevitable that difficulties should exist and complaints arise along the line of division between varying systems of classification and unlike methods of tariff construction."

Trans. p. 48.

It seems to me to be the refinement of cruelty to compel the appellant lines which serve the Chattanooga group to remove difficulties which are conceded to be inevitable; and to remove those difficulties by reducing their rates to Chattanooga and the twenty-four other Southern cities with which Chattanooga is grouped; while the carriers who serve the Nashville group, and who are alone responsible for the Nashville rates, are not required to contribute anything towards relieving the "inevitable" difficulties.

LIX.

The Second Section of the Act to Regulate Commerce Has no Application to This Case.

The second section of the Act to Regulate Commerce is:

"That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this Act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

24 U. S. Stat. at Large, pp. 379, 380.

The second section was construed by this Court, in Wight vs. U. S., 167 U. S., pp. 516-518. In that case, a railroad company charged one shipper a higher rate than another shipper for the carriage of beer from the same place of shipment (Cincinnati) to the same place of destination (Pittsburg.) The Court held that the phrase "under substantially similar circumstances and conditions," *as used in the second section*, refers to the matter of carriage, and does not include competition. The Court said that it was the purpose of *the second section* to enforce equality between shippers, and to prohibit "any rebate or other device by which two shippers, shipping over the same line, *the same distance*, under the same circumstances of carriage, are compelled to pay different prices therefor."

As Chattanooga and Nashville are not the *same distance* from New York, and other Northeastern cities, the second section has no application to this case.

And so Judge Severens held.

Trans. p. 380.

LX.

The Order Made by the Commission in this Case is Not Lawful Under the First Section of the Act.

The first section enacts that all charges "shall be reasonable and just."

24 U. S. Stat. at Large, p. 279.

Mr. Justice Brown, in delivering the opinion of this Court, in the case of I. C. C. vs. B. & O. R. R., said:

"That a charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination, or an unreasonable preference, under section 2 and 3."

145 U. S., 277, I. C. C. vs. B. & O. R. R.

I have hereinbefore shown that the disparity in rates in this case does not violate either the fourth, third or second section of

the Act. I shall therefore confine the concluding part of my argument to the question as to whether there is sufficient evidence in the record in this case to justify this Court in decreeing that the rates to Chattanooga are not reasonable within the purview of the first section of the Act.

In the case of Ames vs. U. P. R'y Co., Mr. Justice Brewer used this language:

"But the grave question still remains, are the rates prescribed in this Act as the maximum over which the railroad companies may not go unreasonable, and so unreasonable as to justify the Court in staying its operation? *No more difficult problem can be presented than this.* There are so many matters which enter into it, and which must be taken into consideration, before a satisfactory answer can be reached."

64 Fed. Rep., 173, Ames vs. U. P. R'y Co.
C. M. & St. P. Ry. vs. Tompkins, et al. MS. Op. Oct. Term, 1899.

In the same case, reported under the style of Smyth et al. vs Ames et al. (known as the "Nebraska Freight Rate case"), the Supreme Court said: "How such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question."

Smyth et al. vs. Ames et al., 169 U. S., 546.

In the case of U. S. vs. Freight Association, 166 U. S., p. 331, Mr. Justice Peckham used this language:

"What is a proper standard by which to judge the fact of reasonable rates? Must the rates be so high as to enable the return *for the whole business* done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, *what is a fair and reasonable profit*? That depends sometimes *upon the risk incurred*, and the rate itself differs in different localities; which is the one to which reference is to be made as the standard? Or is the reasonableness of the profit to be limited to a *fair return upon the capital that would have been*

sufficient to build and equip the road, if honestly expended? Or is still another standard to be created, and the reasonableness of the charges tried by the cost of the carriage of the article, and a reasonable profit allowed on that? And in such case would contribution *to a sinking fund to make repairs upon the roadbed and renewal of cars*, etc., *be assumed as a proper item?* Or is the reasonableness of the charge to be tested by reference to the charges for the transportation of the same kind of property made by other roads similarly situated? If the latter, a combination among such roads as to rates would, of course, furnish no means of answering the question. It is quite apparent, therefore, that *it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation.*"

The italics are mine.

166 U. S., pp. 331, 332.

In the case of Smyth et al. vs. Ames et al., Mr. Justice Harlan said:

"We hold, however, that the basis of all calculations as to reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be *the fair value* of the property being used by it for the convenience of the public. And in order to ascertain that value, the *original cost of construction*, the amount expended in *permanent improvements*, the *amount and value of its bonds and stock*, the *present, as compared with the original cost of construction*, the probable *earning capacity* of the property under particular rates prescribed by statute, and the sum required to meet *operating expenses*, are all matters for consideration, and are given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

Smyth et al. vs. Ames et al., 169 U. S., p. 546, 547.

In the cases which have involved the question as to the *reasonableness* of rates, "labyrinths of tables, figures, and estimates," were presented in the testimony, discussed by counsel in their briefs, and considered by the Court with the closest scrutiny and greatest patience, as will be seen by reference to the opinions in:

64 Fed. Rep., pp. 179 to 194, Ames vs. U. P. Ry. Co.
78 Fed. Rep., pp. 263-275, Southern Pacific Co. vs. Board of Railroad Commissioners.
154 U. S., pp. 402-413, Reagan vs. Farmers' Loan & Trust Co.
Smyth et al. vs. Ames et al., 169 U. S., 466.

In the case at bar, there will not be found either in the testimony taken before the Commission, or in the testimony taken in the Circuit Court, any sufficient evidence of the various and numerous facts suggested by Justices Peckham and Harlan as proper to be considered in determining what are reasonable rates. Nor will there be found any sufficient evidence of the various and numerous facts that were actually considered by the courts in determining what were reasonable rates in the cases cited above.

I submit, therefore, that the evidence is wholly insufficient to enable either the Commission, the courts below, or this Court, to intelligently decide that the Chattanooga rates involved in this case are unreasonably high in and of themselves.

LXI.

The Burden is on the Appellee to Prove That the Chattanooga Rates are Unreasonably High in and of Themselves.

In the case of Harding vs. C. St. P. M. & O. R. Co., decided in 1887, which was one of the earliest cases decided by the Commission, the Commission held that "on a petition charging the

exaction of *unreasonable* rates, *the burden of proof is on the petitioner* to sustain the charges by evidence which shows with reasonable certainty that they are in substance true."

See 1 I. C. Rep., p. 375.

In the case of Brewer & Hanleiter vs. Louisville & Nashville R. R. Co., decided in 1897, and which is one of the latest cases decided by the Commission, the Commission reiterated the doctrine that the burden of proving that a rate is in and of itself unreasonable is on the complainant.

See 7 I. C. Rep., p. 234.

Counsel for the appellee contended, in argument, in the Court below, that as the facts which are necessary to enable the Court to determine the reasonableness of rates are peculiarly within the knowledge of the appellants, the burden of proving those facts ought to be placed upon them.

The contention of counsel is directly antagonistic to the decision of the Commission in the two cases just cited. Counsel overlooked the fact that section 20 of the Act to Regulate Commerce authorizes the Commission to require annual reports from all interstate railroad companies, and to require from them "specific answers to all questions upon which the Commission may need information." Counsel also overlooked the fact that interstate railroad carriers make annual reports to the Commission, showing in detail many of the facts which are proper to be considered in determining the reasonableness of rates; and if any additional facts were desired by the Commission, all that it had to do was to call for them under the twentieth section of the Act.

Counsel for the appellee contended, in argument, in the Court below, that the appellants recognized that the burden of proof was upon them, by taking the testimony of certain expert witnesses, to the effect that, in their opinion, the Chattanooga rates are just and reasonable. The appellants, knowing that the Report and Opinion of the Commission would be relied upon as prima facie evidence of the facts, took their testimony in the

Circuit Court, in advance of any testimony that was taken in said Court, by the Commission; and not knowing what testimony the Commission would take in said Court upon the question as to the reasonableness of said rates, the appellants took said expert testimony; not because they supposed that the burden of proof was upon them, but to anticipate any proof upon the subject that the Commission might afterwards take.

LXII.

A Railroad Company is Entitled to a Fair Return Upon the Value of that Which it Employs for the Public Convenience.

"The foundation of the idea of reasonableness is justice. That which is unjust cannot be reasonable; and when the strong arm of the Legislature is laid upon property invested in railroad transportation, it must be so laid as to do justice to such investors. There can be no justice in that which works to such investors a practical destruction of their property thus invested. It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit at one place, and under one prescribed rate of transportation, can be taken elsewhere, and put to use at other places and under other circumstances. The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed. The protection of property implies the protection of its value."

64 Fed. Rep., 176, 177, Ames vs. U. P. Ry. Co.

"Justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others."

154 U. S., 412, Reagan vs. Farmers' L. & T. Co.

"What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

Smyth et al. vs. Ames et al., 169, U. S., 547.

LXIII.

In Order to Determine Whether the Rates of a Railroad Are Reasonable Its Operations as a Whole Must Be Considered.

In order to ascertain whether a railroad company has, during any given period, received reasonable compensation for the use of its property, it is necessary to know the result of its operations *as a whole*. The result of its operations as to any particular article, as coal, pig iron, etc., is of no value; because, though the railroad company may have carried some such articles at, or even under cost, the other articles carried by it may have yielded more than a reasonable profit upon the investment. And so, though it may have carried some articles at rates which, looked at by themselves, would appear to be excessive, yet when considered in connection with low rates charged on other articles the volume of traffic carried by it, taken as a whole, may be found to be insufficient to yield a fair return upon the value of the road.

In the case of the Chicago & N. W. Ry. Co. vs. Dey, Mr. Justice Brewer said:

"Coming now to the question of the schedule as presented, I remark that the schedule, *as a whole*, must control, and its validity or invalidity *does not depend upon the sufficiency or insufficiency of the rates for any few particular subjects of transportation.*"

35 Fed Rep., p. 881, C. & N. W. Ry. Co. vs. Dey.

In the case of Chicago, etc., Ry. Co. vs. Minnesota, Mr. Justice Miller, in a concurring opinion, said:

"That the proper, if not the only, mode of judicial relief against the tariff of rates established by the Legislature, or by its Commission, is by a bill in Chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation

from exacting such fares as excessive, or establishing its right to collect the rate as being within the limit of a just compensation for the services rendered."

"That until this is done, *it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the question which ought to be settled in this general and conclusive method.*"

134 U. S., p. 460, Chicago, etc., Ry. Co. vs. Minnesota.

In its Eleventh Annual Report, the Commission states that the classifications now in use in this country embrace from 5,000 to 7,000 items.

11 An. Rep., I. C. C. (1897), p. 66.

How would it be possible for any tribunal to ascertain what would be a reasonable rate upon one of those items, as for instance, coal, or pig iron, without taking into consideration the rates on any of the remaining five or seven thousand articles?

It is equally impossible to ascertain what would be reasonable rates for the transportation of any particular traffic separated from the main body of traffic carried by a railroad; as for instance, the particular traffic that is carried by the appellant lines from Eastern cities to Chattanooga.

To illustrate: Mr. Davant testifies that the amount of revenue derived by the Norfolk & Western Railroad, one of the appellants, from the carriage of freight shipped from New York and Boston to Chattanooga in 1892 was $19,000.70.

Trans. p. 152.

"The Statistics of Railways in the United States, 1892, Interstate Commerce Commission," pages 306, 307, show that for the year ending June 30, 1892, the total earnings of the Norfolk & Western Railroad from operation were $8,667,371.00. It will be seen therefore that the amount of revenue derived by the

Norfolk & Western Railroad from the carriage of freight shipped from New York and Boston to Chattanooga in 1892 was less than three-tenths of one per cent. of the total amount of revenue, derived by the said company from the operation of its road. How is it possible to single out three-tenths of one per cent. of the traffic of the Norfolk & Western Railroad, and determine that the rates, charged upon that particular traffic, are reasonable or unreasonable, without considering the rates charged by that road upon the remainder of its traffic, which constitutes 99 7-10 per cent. of the whole.

One of the errors which the Commission persists in committing is, that it will attempt, from time to time, to single out a particular traffic, like that which is carried by the Norfolk & Western Railroad, and its connections, from New York and Boston to Chattanooga, and to determine what is a reasonable rate for the carriage of that particular traffic; and while in this case the Commission expressly declined to determine what would be reasonable maximum rates to be charged, from Eastern cities to Chattanooga (Trans. p. 54-55), yet it has in other cases attempted to determine the reasonableness of rates where it was as impossible to do so as it is in this case.

The appellants are entitled to receive, from the entire body of their traffic, rates which will pay operating expenses, and a fair interest upon the actual value of their property; and the traffic carried by them from Eastern cities to Chattanooga should contribute its fair proportion to the total revenue which they are entitled to realize from its operation; provided competitive circumstances and conditions at Chattanooga will permit of it. But it is impossible to ascertain the fair proportion of that particular traffic, without considering the entire body of rates charged by the appellants.

LXIV.

The Memphis and Nashville Rates are of No Value in Determining the Reasonableness of the Chattanooga Rates.

The Commission in its Report and Opinion says: "When these carriers, for instance, charge seventy-three cents per hundred pounds on fourth-class freight from New York to Chattanooga, and, at the same time, carry like shipments 150 miles further to Nashville, for forty-two cents a hundred, and do this, not incidentally, but for a series of years, the belief that the higher rate is excessive becomes a positive conviction."

Trans. p. 54.

Judge Severens in his opinion says:

"Nevertheless, a reference to the Memphis rate is of value in determining whether the rates to Chattanooga are reasonable rates, it appearing that, though the distance is nearly one-third greater than to Chattanooga from the East, rates are accepted from the Memphis business considerably less than those at Chattanooga."

Trans. pp. 371, 372.

The Commission held that so far as the fourth section is concerned, appellants are justified by the existence of *water* competition, of controlling force, in charging less on traffic for the longer distance to Memphis. And, therefore, the Commission gave no relief to Chattanooga as against Memphis.

According to Judge Severens, however, though the Commission declined to grant relief to Chattanooga as against Memphis under the *fourth* section, the Commission could and should have used the Memphis rates as evidence that the shorter distance rates to Chattanooga are unreasonable, and, *in that way*, it could and should have granted relief against Memphis under the *first* section.

In the case of A. T. & S. F. R. R. vs. D. & N. O. R. R., 110 U. S., p. 684, this Court refused to use through rates as presumptive evidence that local rates are unreasonably high.

If Judge Severens is right, there is no use for either the second, third or fourth sections of the Act in any long and short haul case; because every such case can be disposed of under the first section. If a disparity of rates constitutes an unjust discrimination, then, according to Judge Severens, the higher rate is unreasonable; and dispensing with the second section, relief may be given under the first section. So, if a disparity of rates constitutes an undue prejudice, then, according to Judge Severens, the higher rate is unreasonable; and dispensing with the third section, relief may be given under the first section. And so, if a greater charge be made for a shorter than for a longer distance, then according to Judge Severens, the shorter distance rate is unreasonable; and dispensing with the fourth section, relief can be given under the first section.

But according to Mr. Justice Brown:

"A charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination, or an unreasonable preference, under sections 2 and 3." And he might have added, with equal propriety, "may create a greater charge for a shorter than for a longer distance, under such circumstances as to violate section 4."

145 U. S., 277, I. C. C. vs. B. & O. R. R.

According to Mr. Justice Brown, the first section of the Act has a scope of its own, and covers a ground entirely distinct from that covered by either section 2 or section 3; and, I may add, entirely distinct from that covered by section 4.

Again, Judge Severens said:

"I think the question of the justness and reasonableness of rates under the first section is colored by the other provisions of

the law and by the general policy of the whole enactment, which is to effect the *equality* of charges."

Trans. p. 375.

I have heretofore shown that neither the common law nor the Act to Regulate Commerce requires "equality of charges," except where the services are similar; and therefore I submit that Judge Severens is in error in referring to "the general policy" of the Act as aiming at the "*equality* of charges." I also submit that he is in error in holding that "the first section is colored by the other provisions of the law;" for, as stated above, Mr. Justice Brown holds, in effect, that the first section has a scope of its own, which is distinct from that of any other provision of the law.

LXV.

No Comparison of Rates is of Any Value, Unless the Services be Similar.

In the case at bar, Judge Severens said:

"The question whether the rates are just and reasonable in themselves is in some measure a relative one; that is to say, it may be tested by a comparison of the particular rates with those accepted elsewhere for a *similar* service, etc."

Trans. p. 375.

I agree to that proposition; provided due importance be given to the word "*similar*."

Again, Judge Severens says:

"It seems to me clear, that the charges accepted for the longer haul may be referred to for the purpose of considering the reasonableness of the charges made for the shorter haul."

Trans. p. 375.

I agree to that proposition also, provided the service performed in the case of the longer haul be "*similar*" to the service

performed in the case of the shorter haul. It is difficult, however, to imagine a case where a carrier would charge less for a longer than for a shorter haul, unless the circumstances and conditions of the two hauls were substantially *dis*similar.

LXVI.

It is not Fair to Compare Competitive Rates with Non-Competitive Rates; nor Competitive Rates Which Are Made Under a Certain Degree of Competition with Competitive Rates Made Under a Less Degree of Competition.

In the case at bar, Judge Severens said:

"Such comparisons are applied to every other kind of business, and the fact that there may be competition in such business would not be a controlling consideration, *for the presumption would always be* that the compensation charged for the service or thing is sufficient to be *reasonable*."

Trans. p. 375.

Again, he said:

"If, as I gather from the testimony, the through rates to Nashville afford a *fair* profit to the carriers, whether the Northern Trunk Lines or the respondents (*and it is reasonable to suppose they would not engage in the business without it*), there is substantial ground for contending that the same charge for carrying freight from the East to Chattanooga would afford a reasonable profit, and would therefore be a reasonable charge."

Trans. p. 375.

DIAGRAM No. 9.

I agree that if the competition from A to B, in Diagram No. 9, above, be substantially similar to the competition from C to D, then the rates charged from A to B may be fairly compared with the rates charged from C to D. But if the competition existing from A to B, between the two competing lines shown in the first figure on the diagram has been such as to result in abnormally low rates, while the competition existing from C to D has not had so depressing an effect, then I deny that any fair comparison can be made between the rates from A to B and those from C to D.

Suppose it should be shown that merchants are constantly in the habit of selling salt, domestics, and other staple articles, at one per cent. profit. It would be perfectly fair to compare the rates charged by one merchant upon *those* articles with the rates charged by another merchant in the same town upon the *same articles*; for it would be right to assume that if, for any reason, one merchant could afford to sell those articles at a certain profit, another merchant in the same town could afford to sell them at the same profit; and the fact that the profits of both merchants on those articles were controlled by the same degree of competition would not alter the case. But would it be fair to compare the profit which those merchants accepted on salt, domestics, etc., with their profit on fancy imported articles and foreign dress goods? *In a word, it is fair to compare competitive rates with competitive rates, when the competition is substantially the same in both cases; and it is fair to compare non-competitive rates with non-competitive rates; but it is not fair to compare competitive rates with non-competitive rates; nor competitive rates made under a certain degree of competition with other competitive rates, which are made under a less degree of competition.*

When Judge Severens says that:

"The presumption would always be that the compensation charged for the service or thing is sufficient to be *reasonable;*" and when he says that the presumption is that through rates to longer distance points "afford a *fair* profit," or the carriers would not engage in the business; the correctness of his proposition depends entirely upon the meaning to be given to the words "reasonable" and "fair"

It may be said that a profit of one per cent. on salt, domestics, and other staple articles, is a "reasonable" and "fair" profit on those articles; or the merchant "would not engage in the business." And the profit may be, in fact, "fair" and "reasonable;" provided the merchant be allowed to charge higher profits upon fancy imported articles, dress goods, etc. A merchant is compelled to carry certain staple articles in stock in order to draw customers for his higher priced goods; and he may "fairly" and "reasonably" accept extremely low rates of profit upon his staple goods, rather than deplete his stock of such articles, and thereby drive away his custom. But if by the words "fair," and "reasonable," Judge Severens means that because a merchant accepts one per cent. profit upon staple articles, the presumption is that it is a fair and reasonable profit to be charged *upon all other articles sold by him*, and that he ought not to be allowed to exceed that profit upon any other article; then I respectfully dissent from his proposition. Any such rule of law administered in a case where a merchant was suing for articles sold and delivered, for which no price had been previously stipulated, would destroy the mercantile business of the country. No court would think of charging a jury in a suit brought by a merchant to recover for the value of an imported lace shawl, sold by him, that the jurors must, in ascertaining its value, restrict the merchant to the same rate of profit upon the shawl as that which he accepts on domestics, and other staple articles.

LXVII.

There is no Such Presumption as that Competitive Rates are Reasonably High.

The proposition of Judge Severens, referred to in the last preceding section of this argument, is plausible and apparently logical, but in reality sophistical.

It may be put in syllogistic form, as follows:

1. Rates charged by a carrier to a longer distance point must be reasonably high.

2. The rates charged by the appellants to the shorter distance point (Chattanooga) are higher than the rates charged by them to the longer distance point (Nashville).

3. Therefore, the rates charged by them to the shorter distance point (Chattanooga) are *un*reasonably high.

The fault in the syllogism is to be found in the major premise. And it consists in stating a fact as being true under all circumstances; which, though it may be true under certain circumstances, is not true under other circumstances; and is not true under the circumstances of the particular case, in which the syllogism is invoked.

A similarly faulty syllogism would be the following:

1. Men are black.

2. George Washington was a man.

3. Therefore, George Washington was black.

If a railroad has no competition to contend with, its own interests will induce it to charge according to distance.

In that case, rates charged by it to a longer distance point may properly be presumed to be reasonably high; and in that case, the major premise of the syllogism would be true.

But such competition either between market and market, or between product and product, or between carrier and carrier, may exist at the longer distance point, that the presumption, instead of being that the rates to that point are reasonably *high*, is that they are reasonably, or perhaps unreasonably, *low*.

In the case of Smyth et al. vs. Ames et al., this Court quoted the following from Mr. Justice Brewer:

"It must be remembered that these roads are competing roads; *that competition tends to a reduction of rates*—sometimes, as the history of the country has shown, *below that which affords any remuneration to those who own the property.*"

Smyth et al. vs. Ames et al., 169, U. S. 542.

In its Eleventh Annual Report, the Commission says:

"Rates to competing and distributing centers are not for the most part unreasonably high; they are frequently *quite low.*"

11 An. Rep., I. C. C. (1897), p. 14.

It is manifest, therefore, that there can be no such presumption, either of fact, or of law, as that the rates charged by carriers to longer distance competitive points yield a "reasonable" or "fair" profit, to which they ought to be restricted in their charges upon all other traffic carried by them.

LXVIII.

If Competitive Rates Are to Be Used as a Standard for Fixing Local Rates, the Rates on Low-Class Traffic Will Have to Be Used as a Standard for Fixing Rates on High-Class Traffic.

To illustrate my meaning, it will be seen from the Report and Opinion of the Commission in this case, that the rate from New York to Nashville on class 6 is 31 cents per hundred pounds; while the rate from New York to Nashville on class 1 is 91 cents per hundred pounds; making a difference in rates of 60 cents

per hundred pounds in favor of class 6, as against class 1, from New York to Nashville.

Trans. p. 42.

Now, if the low Trunk Line rates from New York to Nashville are to be used as a standard for fixing rates from New York to Chattanooga, why is it that the low Trunk Line rate to Nashville on class 6 is not to be used as a standard for fixing the Trunk Line rates to Nashville on the remainder of the six classes of freight? Why cannot the argument be made, that if Trunk Lines in connection with the Louisville & Nashville Railroad have, for a long series of years, carried traffic known as class 6 from New York to Nashville for 31 cents per hundred pounds, the presumption is, that it has afforded them "a fair profit," or "they would not engage in the business;" and if 31 cents per hundred pounds affords "a fair profit" for carrying class 6 from New York to Nashville, the higher rates charged by them from New York to Nashville upon the remainder of the six classes of freight must be unreasonably high? And yet, if anyone should seriously contend that the carriers of this country ought to be compelled to charge on the lower classes of traffic as high rates as are charged on the higher classes, the contention would be regarded as preposterous.

It is certain, however, that precisely the same fact which compels carriers to accept exceedingly low rates to all points on the lower classes of traffic, compels them to accept exceedingly low rates to competitive points on all classes of traffic; and the sole compelling fact in both cases is competition. The reason why low class traffic can only pay very low rates is because of competition between *product and product*. Wheat shipped from the Northwest to Nashville comes into competition with wheat grown in Kentucky and Tennessee; and therefore wheat from the Northwest must be carried at a sufficiently low rate to enable it to compete in Nashville with wheat that is grown nearer to Nashville. Again, if the rate charged upon wheat, added to its cost at the place of production, makes the selling price of wheat in Nashville too high, as compared with corn, rye, etc., the amount of wheat consumed will diminish, and the deficit will be made up

from corn, rye or other grain. In a word, the only reason why exceedingly low rates are charged upon the lower classes of traffic is that *competition* between *product and product* compels it; and the only reason why rates to Nashville on all classes of traffic are less than the rates to Chattanooga is that competition by the Trunk Lines in connection with the Louisville & Nashville Railroad exists at Nashville, but does not exist at Chattanooga. If the Trunk Line competition which exists at Nashville, but does not exist at Chattanooga, is to have the effect to reduce Chattanooga rates to the level of Nashville rates, it should also have the effect to reduce the rates on high-class traffic to the level of the rates on low-class traffic, or to raise the rates on low-class traffic to the level of the rates on high-class traffic.

LXIX.

While the Nashville Rates do Not Yield as Much Profit as Carriers Might Otherwise Reasonably Demand, They May be Lawfully Accepted, Provided They Yield Some Margin of Profit Over the Additional Cost of Movement of Said Traffic.

I have hereinbefore commented upon the proposition contended for by the appellee, and sustained by Judge Severens, to the effect that the presumption is that the rates charged by carriers to longer distance points yield a reasonable profit, and therefore that higher rates charged to shorter distance points must yield an unreasonably high profit.

Counsel for the appellee, in his argument in the Court below, contended for another proposition which Judge Severens apparently approved, and which is entirely different from, and inconsistent with, the proposition upon which I have hereinbefore commented.

The other proposition may be put in syllogistic form as follows:

1. Rates charged to longer distance competitive points do *not* yield reasonable compensation for the service performed by the carrier.

2. The loss sustained by the carrier on traffic to longer distance competitive points is made up by increasing the rates to shorter distance points.

3. Therefore, carriers ought not to be allowed to charge less for a longer than for a shorter distance, over the same line, in the same direction, etc.

The first fault in this syllogism is to be found in the major premise; and it is the fault of indefiniteness. How are we to decide what is a "*reasonable*" compensation for transportation to a *competitive* point?

In the case at bar, the Commission said:

"There is a conceded margin of profit in the rates now in force to Nashville and Memphis (the longer distance points), *with reference to the additional expense incurred in carrying Eastern traffic to those destinations*, but whether that margin affords *reasonable* compensation for the services thus rendered cannot be determined from the evidence."

Trans. p. 51.

It is plainly inferable from the language just quoted that rates which merely yield a "margin of profit" over and above the additional expense incurred by the carrier in the transportation of the particular traffic upon which such rates are charged are not considered by the Commission to be "reasonable compensation" for the service; though the Commission does not tell us how much such rates would have to be increased before they would yield a "reasonable compensation."

My contention is that if *competitive* rates pay anything over and *above the additional cost of movement* of the competitive traffic, it is right and reasonable that they be accepted by the carrier, rather than abandon the competitive traffic. On the other hand, counsel for the appellee contended in his cross-examination of witnesses that competitive rates ought to be sufficient not only

to pay the *additional cost of movement* of the competitive traffic, but also the proportion of operating expenses, fixed charges, etc., which the tonnage of the competitive traffic bears to the total freight tonnage of the carrier.

Trans. p. 142.

His proposed method of rate construction is correct in theory; and it would be followed by every railroad traffic manager in the country, if it were practicable to do so. But the utter impracticability of constructing rates upon the theory contended for by counsel was demonstrated by the Commission itself in 1887, In Re Southern Railway & Steamship Association (sometimes cited as In Re Louisville & Nashville Railroad Co.). In that case the Commission said:

"This distinction between *the cost of movement* and *the fixed charges* often becomes of importance in such cases as that of the lumber trade just mentioned. That trade is new; the roads which take it were built without anticipating its springing up, and their managers made their calculation for business to meet the whole cost of operation in reliance upon such traffic as was then apparent or probable. The *fixed charges* of the road may, for purposes of illustration, be assumed to equal one-half of the whole, *the cost of movement* of freight the other half. The rates laid were doubtless calculated to cover the whole, with a margin for profit, and were so laid that all traffic would contribute towards both *fixed charges* and *cost of movement*. But now comes this new business, and from the nature of the case low rates are a necessity to it; it can pay perhaps little if anything more than half what is paid by other traffic. But taking it will not increase perceptibly *the fixed charges* of the road because those are made up of the items that must be paid whether the traffic is large or small. What is added to the cost by taking it *is simply the expense of its own handling and movement*: and, upon the supposition made, there might perhaps be gain to the road instead of loss in taking it at anything above half the rates which are levied upon other traffic corresponding to its classification. *It might, therefore, be carried at such rates without wrong to any one.*"

1 Interstate Commerce Rep., p. 284, right col., In Re Southern Ry. & S. S. Association.

What is said by the Commission with reference to the lumber trade is equally applicable to all the lower kinds of freight, such as iron ore, stone, sand, brick, cement, pig iron, etc. If the courts once hold that each and every kind of traffic must be charged such rates as will pay not only the "additional expense incurred" by the carrier in the transportation of that particular kind, but also the full proportion which such traffic ought to contribute towards all the operating expenses, and fixed charges of the carrier, then the courts will put an absolute embargo upon more than half of the tonnage now carried by the railroads of this country.

The Commission in its First Annual Report to Congress said:

"It was very early in the history of railroads perceived that if these agencies of commerce were to accomplish the greatest practicable good, the charges for the transportation of different articles of freight could not be apportioned among such articles by reference to the cost of transporting them severally, for this, if the apportionment of cost were possible, would restrict within very narrow limits the commerce in articles whose bulk or weight was large as compared with their value. On the system of apportioning the charges strictly to the cost, some kinds of commerce which have been very useful to the country, and have tended greatly to bring its different sections into more intimate business and social relations, could never have grown to any considerable magnitude, and in some cases could not have existed at all, for the simple reason that the value at the place of delivery would not equal the purchase price with the transportation added."

See First Annual Report Interstate Commerce Commission [1887], p. 30.

What is said by the Commission with reference to the impracticability of apportioning the charges for the transportation of different articles of freight among such articles by reference to the cost of transporting them, severally, is equally applicable to the theory that the charges for the transportation of competitive and non-competitive freight ought to be apportioned between them by reference to the cost of transporting them, severally. The reason why low-grade traffic cannot be made to pay in pro-

portion to the cost of its transportation, is, as the Commission properly states, because the charge for carriage would be greater than it could bear. And the reason why competitive traffic cannot be made to pay in proportion to the cost of transporting it, is, because the charge for carriage upon that basis by the longer line would ordinarily be greater than by the shorter line; the longer line would be driven out of competition; the shorter line would secure a monopoly; and all competition would be destroyed.

The second fault in the syllogism referred to above in this section is to be found in the minor premise. In that premise it is erroneously assumed that a *loss* is sustained by the carrier on traffic to longer distance competitive points. I have just shown that the Commission itself conceded, in the case at bar, that so far from there being any *loss* to the appellant carriers on traffic to Nashville, the longer distance point, there is a "margin of *profit;*" *at least with reference to the "additional expense incurred" in carrying that traffic to Nashville* (Trans. p. 51). In other words, *there is no loss at all.* The real ground of objection is, that the margin of profit is not as great as it should be; and the answer to the objection is, that if there is no loss upon the traffic carried to Nashville, the carriage of that traffic by the appellants has no tendency whatever to increase the rates to Chattanooga, or to any other point. On the contrary, the profit, however small it may be, which the appellant carriers may derive from the Nashville traffic enables them to improve and increase their facilities for handling the Chattanooga traffic, as well as the other traffic on their lines.

The third and greatest fault in said syllogism is to be found in the conclusion which is sought to be drawn from the major and minor premises.

If it were true that rates charged to longer distance competitive points do not yield proper compensation; and if it were true that their failure to do so causes a loss which the carrier tries to make up by increasing the rates to the shorter distance points; it is manifest that if the rates to the shorter distance points be

reduced to the same as the rates to the longer distance points, the loss to the carrier will be increased instead of being diminished. In other words, if the courts compel carriers in the Southern territory to accept to all of their stations rates as low as those which competition compels them to accept to the longer distance competitive points, the result must be the universal bankruptcy of the southern railway system.

LXX.

Railroad Traffic Managers do not "Have Everything their Own Way;" Their Rates are Made for Them by Competition.

In the case at bar, Judge Severens says:

"But it is to be remembered that the railroad business of the country is conducted by able men, animated, as it is right to suppose, with the desire to promote the interests of those whom they serve. Further to promote the efficiency of their work, the officers of the various companies have their associations for the purpose of comparing, studying and adjusting the rates of traffic on their several lines. *In the absence of the other party, they have everything their own way.* It would be expecting something not encountered or expected in other branches of business if we anticipated that they would assume a judicial attitude toward those with whom their business is to be done."

Trans. p. 372.

Judge Severens is correct in saying that railroad traffic managers are animated with the desire to promote the interests of those whom they serve. But experience has taught them that the most effective way to promote those interests is to promote the interests of the patrons of their roads. This is not attributing to railroad officials any charitable or benevolent motive. On the contrary, it is conceding that they are intelligently selfish.

The error of Judge Severens consists in the statement that railroad traffic managers, in studying and adjusting the rates of traffic on their several lines, act "in the absence of the other

party," and that "they have everything their own way." The error is quite a popular one, and it grows out of a want of familiarity with the practical method of rate making in this country.

At the present day, it cannot be said that railroad traffic managers make their rates at all.

So far as rates to and from *competitive* points are concerned, they are fixed inexorably, and absolutely, by competition. A traffic manager has nothing to do but to ascertain the rates which his rivals are offering to accept; and he must adopt, or closely approximate, those rates, or abandon the competitive traffic.

As to rates to and from local stations, a railroad traffic manager, in many of the States, is restricted by State railroad commissioners; and in every State he is restricted by competition between product and product, and between market and market; which kinds of competition have a controlling influence upon the rates which can be charged to and from even the most strictly local stations on a road. To illustrate: Cotton is raised on the line of the Central Railroad of Georgia (one of the appellants), and it is shipped from many of the local stations on that road. But that cotton is raised and shipped in competition with cotton raised upon other railroads in Georgia; and in competition with cotton raised upon railroads in other States. The Traffic Manager of the Central Railroad of Georgia must accept such rates on cotton from its local stations as will enable that cotton to be carried to, and sold in, the markets of the world, in competition with cotton raised upon the lines of other railroads in Georgia, and in other States; or the cotton cannot be moved at all. In that event, the Central Railroad of Georgia will lose the revenue that it might otherwise realize from the transportation of cotton from its local stations.

Again: If the cost of producing cotton, added to a certain rate charged for transportation, exceeds the price which can be obtained for cotton in the market, the cotton will not move from the local stations; and the railroad will lose the revenue which it might otherwise realize from the transportation of local cotton. It is necessary, therefore, that the traffic manager acquaint him-

self, not only with the rates which other railroads are accepting for the transportation of cotton for similar distances, but also with the cost of producing cotton, and with the price at which it is selling; and this he cannot do without full consultation with the farmer who raises the cotton, and the merchant who buys it. The same is equally true of corn, wheat, other grain, live stock, and, in fact, of everything produced along the line of a railroad, for shipment from its local stations. Whenever any of those products is offered for shipment at a local station, it is offered with full knowledge that its transportation must be conducted in competition with the transportation by other railroads, of similar products, destined to common or competing markets; and such competition is as controlling, though not in the same degree, as that which exists at those cities where numerous rival lines of railroad intersect.

The Commission, in speaking of railroad associations, says:

"But in these associations, when in session for the making of rates, each railroad official has, to some extent, had the district which was served by his road behind him; he has felt the pressure of the interests there, and contended for them as against the interests in classification represented by others, not only because it was desirable that the roads should favor the policy its patrons favored, but also because *the same policy was likely to be beneficial to both.*

"The result necessarily is that a classification made by a railroad association represents a series of compromises, *to which not only the railroads are parties, but in a certain sense business interests and sections of country also; thesein many cases being admitted by their representatives to the consultations upon a subject so vitally concerning their interests, and allowed to present their views.*"

1 An. Rep., I. C. C. (1887), p. 31.

In an extract from Senate Report No. 1394, Finance Committee, second session, Fifty-third Congress, published by the Government under the title "Wholesale Prices, Wages and Transportation," it is said that:

"These are the general rules under which classifications are constructed, and while to a large extent controlling, classifications are, notwithstanding, in a great measure a series of compromises, *the participants of which are not alone the railroads, but also the shippers and representatives of business interests throughout the country, the latter being afforded ample opportunity to join with the railroads in the discussion as to the proper classification of articles of shipment affecting their interests.*"

Wholesale Prices, Wages & Transportation, Part I., p. 404.

Judge Severens is therefore in error, when he states that traffic officers, in "studying and adjusting the rates of traffic on their several lines," act "in the absence of the other party and have everything their own way."

LXXI.

Railroads do not and Cannot "Even Up Their Profits" by Increasing Local Rates.

In the case at bar, Judge Severens says:

"If railway carriers engage in a competitive struggle for business at a place where they meet and underbid each other, or other carriers *to a point which is not in itself remunerative*, can they turn back on the line, and taking advantage of the conditions existing at other localities, arising either from the fact that there is no opportunity for competition, or from the fact that by concert of the carriers there is none, charge such rates for the shorter haul, *as shall make good their lack of profit in competitive business*, and even up the profits on their whole business to the point they set before themselves as reasonable? To the proposition thus roundly stated, no doubt counsel for the carriers would say that they could not contend for it, and yet this is the result reached by the not very indirect steps of the argument."

Trans. pp. 375, 376.

I respectfully deny that the argument of "counsel for the carriers" either directly or indirectly leads to any such proposition as the Judge states so "roundly."

I have hereinbefore stated what I regard as the limitations which may be reasonably imposed upon carriers in exercising the right to take into consideration competition as one of the circumstances and conditions affecting transportation; and one of the limitations suggested by me was, that the rates accepted by carriers on traffic to the longer distance competitive point *must yield some profit* (though it may be very small) over the additional cost of the movement of that traffic. The limitation is directly opposed to the idea that carriers "may engage in a competitive struggle" . . "*to a point which is not in itself remunerative.*" If the rates accepted to the longer distance competitive point yield *any* profit over *the additional cost of the movement of that traffic*, they are "remunerative" to some extent, though the remuneration may be very slight.

Another of the limitations suggested by me was, that the rates charged by the carriers to the shorter distance point must not be unjust or unreasonable, within the purview of the first section of the Act. If it be necessary that those rates shall be just and reasonable, within the purview of the first section, it is impossible for the carriers "to turn back on the line," and "take advantage of the conditions existing at such points."

If the rates to the shorter distance points be in fact just and reasonable, the carriers, in charging them, are in no sense "taking advantage" of the persons who pay them.

If the rates charged by the carriers to the longer distance competitive points be remunerative to any extent, however small it may be, there is no "*loss*" sustained by the carriers in the transportation of the longer distance traffic; and therefore there is no occasion for them to "even up" by increasing their shorter distance rates.

If Judge Severens means that railroads must charge at competitive points the same rate of profit as is charged at non-competitive points, then they must abandon competitive traffic altogether. If he means that railroads must accept upon non-competitive traffic as low rate of profit as they may be forced to accept upon competitive traffic, then the Southern railroads must

go into bankruptcy; because they can no more afford to carry all of their traffic at the low rate of profit which they are forced to accept at certain competitive points, than a merchant can afford to sell his entire line of goods at the same rate of profit which he is forced to accept upon certain staple articles. I have already considered this subject and I will not repeat what I have hereinbefore said upon it.

LXXII.

The "Average Receipts Per Ton Per Mile" on a Road Cannot be Used as a Standard of Reasonableness for the Rates of That Road on any Particular Traffic.

"The average receipts per ton per mile" is ascertained by dividing the "total freight revenue" of a railroad by the "number of tons carried one mile."

In order to ascertain the "number of tons carried one mile," it is necessary to keep an account of the actual distance each ton is carried. Each ton is then multiplied by the number of miles it is carried, so as to get its equivalent in tons carried one mile; and the aggregate of the equivalents in tons carried one mile shows the "number of tons carried one mile."

Of course, in actual practice, no one ton of freight is ever carried exactly one mile, and the "number of tons carried one mile" is made up of thousands or millions of shipments of different kinds of freight, carried over the different parts of the line, and carried different distances. It is made up of costly silks carried all the way from New York to Nashville; and of cheap limestone rock carried five miles from some quarry to a furnace.

It is of no more value in determining what are reasonable rates on the six classes of traffic from New York to Chattanooga, than the fact that the earth is the equivalent of a certain number of grains of sand would be in ascertaining the reasonable price of a tombstone.

The "total freight revenue" of a company is ascertained by adding together the freight charges on thousands or millions of shipments, made under various conditions and circumstances. Some shipments consist of single packages, weighing perhaps less than 100 pounds. Other shipments are made in quantities of more than 100 pounds, but less than carloads; others are made in car load quantities; and others in train load quantities. Some of the freight shipped is very light and bulky, and of considerable value per ton; other freight consists of heavy, coarse articles, of comparatively small value per ton. Some shipments are made over short distances; others over long distances; and others over the entire length of the road. The freight charges per ton, per mile, necessarily vary within wide limits, from 8 or even 10 cents per ton, per mile, on first class freight, carried over only a few miles of the road between local stations, to 3½ mills per ton, per mile, on long-haul coal and mineral traffic, and long distance competitive traffic. And, as stated above, it is by dividing the "total freight revenue" by the "number of tons carried one mile" that we ascertain the "average receipts per ton per mile."

As neither the divisor nor the dividend has the slightest relation to the reasonableness of rates, the quotient can have no relation to it.

One might as well divide the number of spikes in a railroad track by the number of cross-ties, and expect the quotient to show what are reasonable rates for each of the six classes of traffic between any two given points.

The "average receipts per ton per mile" of a road is of value, however, to show the proportion which the high-class traffic bears to the low-class traffic of a road.

The tonnage and rates of a road remaining the same, its "average receipts per ton per mile" will increase as the proportion which its high-class traffic bears to its low-class traffic increases.

To demonstrate this fact mathematically, let us assume that the tonnage of any given road is equivalent to 2,000,000 tons

carried one mile, in each of three consecutive years. During the first year, let us assume that one-fourth of the tonnage was class 1, and carried at 5 cents per ton; and that three-fourths of the tonnage was class 6, and carried at 1 cent per ton. We have:

500,000 tons of class 1 at 5 cents.....$25,000
1,500,000 tons of class 6 at 1 cent..... 15,000

Or, 2,000,000 tons at 2 cents.....$40,000

which shows that the "average receipts per ton per mile" was for the year, 2 cents.

During the second year, let us assume that one-half of the tonnage was class 1, and carried at 5 cents per ton; and that the other half was class 6, and carried at 1 cent per ton. We have:

1,000,000 tons of class 1 at 5 cents..... .....$50,000
1,000,000 tons of class 6 at 1 cent 10,000

Or, 2,000,000 tons at 3 cents..... .....$60,000

which shows that the "average receipts per ton per mile" was, for the second year, 3 cents.

During the third year, let us assume that three-fourths of the tonnage was class 1, and carried at 5 cents per ton; and that the remaining one-fourth was class 6, and carried at one cent per ton. We have:

1,500,000 tons of class 1 at 5 cents.....$75,000
500,000 tons of class 6 at 1 cent..... 5,000

Or, 2,000,000 tons at 4 cents.....$80,000

which shows that the "average receipts per ton per mile" was for the third year, 4 cents.

We see that, though the tonnage remained the same, and though the rates charged on class 1 and class 6, respectively, remained the same, during all three of the years, the "average receipts per ton per mile" for the third year was double what it was for the first year; and we see that it increased precisely as the proportion which the high-class traffic bore to the low-class traffic increased. But the proportion which the high-class traffic of a road may bear to its low-class traffic does not throw any light, whatever upon the reasonableness of its rates, either on the high-

class or the low-class traffic. So, the fact that the rates charged on classified traffic from New York to Chattanooga over the appellants' lines pay more than "the average receipts per ton per mile" of those lines, only proves that the New York traffic is of a higher class than other classes of freight, in the carriage of which those lines participate. The traffic carried by the appellants from New York, Boston, etc., to Chattanooga, consists of dry-goods, boots and shoes and other high-class traffic, which is properly charged higher rates than those which the appellants are forced to accept upon their low-class traffic, which consists of coal, iron ore, limestone, etc., the great volume of which, as compared with the volume of appellant's high-class traffic, necessarily reduces their "average receipts per ton per mile."

LXXIII.

The Average Receipts Per Ton Per Mile of One Road Cannot be Used as a Standard of Reasonableness for the Rates of Another Road.

In the last preceding section of this argument I have shown that the "average receipts per ton per mile" of any particular road cannot be used as a standard of reasonableness for the rates of *that* road on any particular traffic; and, a fortiori, it cannot be used as a standard of reasonableness for the rates of *other* roads.

Appellee filed as evidence in this case a certain tabulated statement compiled by the "Interstate Commerce Commission, Division of Statistics, October 20, 1897." Said statement shows the "average receipts per ton per mile," and the "estimated cost of carrying one ton one mile" for the years 1892 and 1893; and the "average receipts per ton per mile" for the years 1894, 1895 and 1896 of the Louisville & Nashville Railroad; Nashville, Chattanooga & St. Louis Railway; Cincinnati, New Orleans & Texas Pacific Railway; Pennsylvania Railroad; New York, New Haven & Hartford Railroad; Pittsburg, Cincinnati, Chicago & St. Louis Railway; Fitchburg Railroad; West Shore Railroad; Lake Shore & Michigan Southern Railway; Cleveland, Cincinnati, Chicago & St. Louis Railway; New York, Chicago & St.

Louis Railroad; New York Central & Hudson River Railroad; Cumberland Valley Railroad; New York, Philadelphia & Norfolk Railroad; East Tennessee, Virginia & Georgia Railway; Norfolk & Western Railroad; Richmond & Danville Railroad; Western & Atlantic Railroad; Central Railroad & Banking Co. of Ga.; Georgia Railroad & Banking Co.; Atlanta & West Point Railroad; Southern Railway and the Western Railway of Alabama.

Trans. p. 257.

I suppose that one object in filing said statement was to institute a comparison between the "average receipts per ton per mile" of the railroads referred to therein, and the receipts per ton per mile realized by the appellants from the carriage of traffic from New York and other Eastern cities to Chattanooga; and from that comparison to deduce an argument that the rates charged by appellants on said traffic are unreasonably high, in and of themselves.

It will be noticed that among said railroads are the New York, New Haven & Hartford Railroad, and the Norfolk & Western Railroad; and it will also be noticed that the "average receipts per ton per mile" of the former was very much higher than the average receipts per ton per mile of the latter. That fact demonstrates that the proportion which the high-class traffic carried by the former bore to the low-class traffic carried by it, was very much greater than the proportion which the high-class traffic carried by the latter bore to the low-class traffic carried by it. The fact is easily accounted for, when we remember that the New York, New Haven & Hartford Railroad is located in New England, and carries a large amount of dry-goods, boots and shoes, and other high-class traffic; while the Norfolk & Western Railroad is located in a mining country, and carries a large amount of low-class mineral traffic. The disparity between the "average receipts per ton per mile" of those two roads, while it proves a corresponding disparity between the proportion of high-class and low-class traffic carried by them, respectively, has no tendency whatever to prove either that the rates charged by the New York, New Haven & Hartford Railroad on its high-class

traffic are too high, or that the rates charged by the Norfolk & Western Railroad on its low-class traffic are too low.

An examination of said statement will show that the "average receipts per ton per mile" are subject to constant fluctuations even on the same road.

As the Commission had access to the reports of all the interstate railroads in the United States, it is fair to assume that in making up a statement which was intended to furnish a basis for an argument, those roads would be selected which are most useful for the purpose; and yet an examination of said statement will show that though it includes 23 railroads, the "average receipts per ton per mile" of no one of said railroads was the same for any two of the five years covered by said statement.

The "average receipts per ton per mile" of the Louisville & Nashville Railroad varied from $\frac{806}{1000}$ of a cent in 1896, to $\frac{941}{1000}$ths of a cent in 1892; that of the Nashville, Chattanooga & St. Louis Railroad varied from $\frac{920}{1000}$ths of a cent in 1895, to 1.035 cents in 1896; that of the Pennsylvania Railroad varied from $\frac{562}{1000}$ths of a cent in 1896, to $\frac{647}{1000}$ths of a cent in 1892; that of the New York, New Haven & Hartford Railroad varied from 1.570 cents in 1896, to 1.747 cents in 1892, etc.

An examination of said statement will show that, with only one exception, the "average receipts per ton per mile" was not the same on any two of said 23 railroads in any year covered by the statement.

The stability of rates is of greater importance than even the reasonableness of rates; and yet if the "average receipts per ton per mile" is to be used as a standard of reasonableness, it is manifest that the rates will be as fluctuating as the standard by which they are measured.

Again, it must be evident to every one that an arbitrary standard such as the "average receipts per ton per mile" cannot be used for fixing *competitive* rates.

In the case of Business Men's Association, etc., vs. C. St. P. M. & O. R. R. Co., 2 Interstate Commerce Rep. p. 41, it was

said by the Commission that "the method of testing the freight rates of a railroad by the rate *per ton per mile*, is one by which these rates may be brought down to the narrowest point of scrutiny, and in this sense is valuable, *but it is like looking at them with a microscope*, for it ignores all other tests except that which it alone furnishes, *and does not take into consideration any of the surrounding circumstances and conditions that enter into the making of the rate, no matter how compulsory or imperious these may be, and for this reason it cannot be considered a controlling rule in determining the reasonableness of rates.*"

Said statement, referred to above, shows that for the year 1896 the "average receipts per ton per mile" of the Pennsylvania Railroad was 563-1000 of a cent. This seems to be a very low rate; but we must remember that it is a rate for only one mile."

The distance from New York to Chicago is 900 miles; and a rate of 563-1000 of a cent per ton per mile would amount to 25 cents per hundred pounds for the 900 miles from New York to Chicago. Said statement also shows that for the year 1896 the "average receipts per ton per mile" of the New York Central & Hudson River Railroad was 668-1000 of a cent per ton per mile; and that rate would amount to 30 cents per hundred pounds for the 900 miles from New York to Chicago.

The Pennsylvania Railroad and the New York Central Railroad are in competition between New York and Chicago, and if the rates of each road are to be fixed in proportion to its "average receipts per ton per mile," the rate of the Pennsylvania Railroad from New York to Chicago would be 25 cents per hundred pounds, while the rate of the New York Central Railroad would be 30 cents per hundred pounds. With a difference of five cents per hundred pounds against it, the New York Central Railroad would, upon certain classes of traffic, be driven out of competition.

In the case of *competitive* traffic, carriers cannot make their rates upon arbitrary formulæ, however plausible or attractive they may appear.

A carrier must accept the same rates as are offered by its competitor, although they may not be in proportion to the "average receipts," per ton per mile.

LXXIV.

The Value of a Thing Cannot be Ascertained by Applying, as a Measure, the Average Value of a Number of Dissimilar Things, Which Differ Greatly in Value as Compared with Each Other, and as Compared with the Thing That is to be Measured.

The "average receipts per ton per mile" represents the average received per ton per mile by a railroad for the transportation of hundreds of thousands or millions of shipments, made under varying conditions and circumstances. As stated above, some shipments consist of single packages, weighing, perhaps, less than one hundred pounds; some shipments are made in carload quantities; and some in train load quantities. Some of the freights are very light and bulky, and of considerable value per ton. Others consist of heavy, coarse articles, of comparatively small value per ton. Some shipments are made over short distances; others over longer distances; and others over the entire length of the road. The freight receipts per ton per mile necessarily vary within wide limits, from eight or even ten cents per ton per mile on first-class freight carried over only a few miles of the road, to three and one-half mills per ton per mile, and even less, on long haul coal and mineral traffic.

No country merchant who keeps in his store a great variety of articles, differing greatly in value, would undertake to ascertain his "average receipts" per pound, or per yard, and to sell all of his goods to his customers at a certain profit over and above his "average receipts." He would find plenty of customers for his dry goods, but none for his coffee and sugar.

The average of the lives of a thousand men or women would

be of value in constructing tables for insuring human lives; but the average of the lives of a thousand animals of different kinds, whose longevity differs widely, would be of no value in constructing tables for insuring human lives; or for insuring the life of any animal of any one of the thousand classes included in the average. In fact, *the average of a number of dissimilar things is absolutely misleading as to any one of them.*

It is stated in Edison's Encyclopedia, p. 201, that the duration of life of certain animals, etc., is estimated to be as follows:

The Whale	1,000	years.
The Swan	200	"
The Elephant	100	"
The Goose	80	"
The Lion	70	"
The Beaver	50	"
The Hawk	40	"
The Horse	30	"
The Cow	20	"
The Monkey	18	"
The Squirrel	7	"
The Wren	3	"
The Bee	½	"
The average of the above is	124½	"

An insurance company might use the average with safety in insuring an elephant for 124 years; but it would not do so in the case of a bee.

It will be noticed that the average does not represent the duration of life of any one of the thirteen animals, etc., mentioned above.

It is stated by the Commission in its Eleventh Annual Report (1897), p. 66, that the classifications now in use in this country embrace from 5,000 to 7,000 items; and when we remember that those items are transported by the railroads in varying quantities for varying distances, and under varying circum-

stances as to speed, etc., etc., it must be evident that an average of the receipts realized from the transportation of so many different articles, under so many differing conditions, must be positively misleading in ascertaining what is a reasonable rate for transporting any one of those articles for any given distance.

The sixth section of the Act to Regulate Commerce requires every common carrier subject to its provisions to file with the Commission copies of its schedules of rates. With those schedules, and with the classifications which govern them, it is practicable for the Commission to compile a table showing the rates charged by each of said carriers upon each of the articles covered by the classifications, and for each of the distances over which the article may be carried. From such tables it might be shown what is the average rate received per ton per mile on each of those articles by all the railroads in this country. And though the conditions under which different railroads operate vary widely, there might be some plausibility in insisting that the average receipts per ton per mile realized by all the railroads in this country from the transportation of a given article, as for instance bituminous coal, should be taken as presumptive evidence of the reasonableness of that rate, wherever the matter might be drawn in question. But the "average receipts per ton per mile" relied upon in argument by counsel for the Commission is not the "average receipts per ton per mile" *of any given article, or of any given class of freight, or even of all classified freight*, but it is an average of each and every article and commodity (whethclassified or not) that may be carried by a railroad, however dissimilar in nature those articles and commodities may be.

LXXV.

The Use of the "Average Receipts" as a Standard in Rate Making Would, by Successive Repetitions, Reduce All Rates to Zero.

The official classification contains six classes, numbered from 1 to 6. Let us assume that the rates charged by a certain railroad, for a certain distance, on the several classes, are, in cents per 100 pounds, as follows:

On Class 1.....6 cents
On Class 2.....5 cents
On Class 3.....4 cents
On Class 4.....3 cents
On Class 5.....2 cents
On Class 6.....1 cent

The average of said rates is 3.5 cents. If the average of rates is to be taken as the standard of reasonableness, the rates on the first three classes would be too high, inasmuch as they exceed the average; and, in revising the tariff, the new rates would be as follows:

On Class 1..... 3.5 cents
On Class 2..... 3.5 cents
On Class 3..... 3.5 cents
On Class 4..... 3 cents
On Class 5.....2 cents
On Class 6.....1 cent

The average of those rates is 2.75 cents; and again using the average as a maximum, the second revision would stand as follows:

On Class 1.....2.75 cents
On Class 2.....2.75 cents
On Class 3.....2.75 cents
On Class 4.....2.75 cents
On Class 5.....2 cents
On Class 6.....1 cent

The average of those rates is 2.33 cents; and again using the average as a maximum, the third revision would stand as follows:

On Class 1.....2.33 cents
On Class 2.....2.33 cents
On Class 3.....2.33 cents
On Class 4.....2.33 cents
On Class 5.....2 cents
On Class 6.....1 cent

The average of those rates is 2.05 cents; and again using the average as a maximum, the fourth revision would stand as follows:

On Class 1.....2.05 cents
On Class 2.....2.05 cents
On Class 3.....2.05 cents
On Class 4.....2.05 cents
On Class 5.....2 cents
On Class 6.....1 cent

The average of those rates is 1.86 cents.

The foregoing illustrations are sufficient to demonstrate that if the average of rates is to be the standard of reasonableness, all rates above the average must be adjudged to be too high, and be reduced so as not to exceed the average; that at each revision the average is necessarily reduced; and that it requires only a certain number of revisions to reduce all of the rates to zero.

LXXVI.

If the "Average Receipts Per Ton Per Mile" Could be Used at all in Rate Making, it Could Only be Used in Connection With Other Things; and Even Then it Could be Used Only in Judging of the Reasonableness of the Schedule as a Whole.

I have hereinbefore shown that in determining the reasonableness of the rates of a company, its operations "as a whole" must be considered; and that it is impossible to determine the reason-

ableness of the rates upon a particular article, or upon a particular portion of the traffic carried by a company, without considering what its rates are on the other articles, or on the other portions of traffic carried by it.

The contention of counsel for appellee, however, is that if the "revenue per ton per mile"—i. e., "the average receipts per ton per mile" is useful, in connection with other things, in determining whether appellants' rates "in general" are excessive, it must be useful to some extent, even by itself, in determining whether the rates on that portion of appellants' traffic which moves from New York to Chattanooga are excessive.

It would be equally logical to contend that if a certain factor, in connection with others, may enable us to solve a certain equation, the same factor will, in the absence of others, enable us to solve any part of the equation.

If you ask a company engaged in manufacturing gas, what it costs to produce a ton of coke, its reply must be that "this depends on what the public will pay for the gas." And if you ask the company what it costs to produce a thousand cubic feet of gas, its reply must be that "this depends on what the public will pay for the coke."

The working expenses of the whole operations of the company are so much. The result of those operations is the output of a certain quantity of gas and a certain quantity of coke. But you cannot say what is a reasonable rate to be charged for the gas until you know what rate the company can obtain for the coke; and you cannot say what is a reasonable rate to be charged for the coke, until you know what rate the company can obtain for the gas. If the company can obtain such rates for the gas as will enable it to approximate a fair return on its investment, it can afford to accept exceedingly low rates on the coke.

Now take, on the other hand, a company engaged in manufacturing coke for neighboring blast furnaces. It can use, in

heating its coke ovens, a certain quantity of gas which is produced in making the coke, but no more; and for the remainder of the gas produced the company has probably no market at all. In this case, evidently, the coke must be looked to as the main reliance to earn a fair return on the investment, and the most that can be expected of the gas is that it shall help, in some slight degree, to lighten the burden.

In the case of a railroad company, the results of its operations *as a whole* are the transportation of a certain number of passengers, a certain quantity of mail and express matter, and a certain number of tons of freight; and to those operations, *as a whole*, it must look for a reasonable return upon the fair value of its investment.

What is denominated "local traffic" is affected by competition between product and product, and competition between "market and market."

What is denominated "competitive traffic" is affected not only by competition between product and product, and competition between market and market, but also by competition between carrier and carrier. And competition between carrier and carrier affects rates differently where there is a marked difference in the circumstances of the competing carriers.

In the case of one railroad company, only one-fourth of its traffic may be "local," and the remaining three-fourths "competitive:" while, in the case of another company, the proportions may be exactly reversed.

Whatever may be the proportions which the "competitive traffic" bears to the "local traffic" of a company, the company must, of necessity, accept such rates on its "competitive traffic" as its rivals may offer; and if the revenue derived from its "competitive traffic" fails to pay a reasonable return upon the value of the investment, the deficit must be made up by increasing the rates on the "local traffic"—if it be possible. And if

competition between product and product, or between market and market, or the action of a State Railroad Commission prevents an increase in the rates on the "local traffic" the company must cease operation.

In the case of a railroad company, as in the cases of the gas company and the coke company, referred to above, you must look to the operations of the company *as a whole*, and before you can decide whether the rates charged upon one source of revenue are reasonable, you must ascertain what amount can be realized by the company from its other sources of revenue.

We see, therefore, that while such data as the "revenue per ton per mile," i. e., the "average receipts per ton per mile," "might" possibly be useful, in connection with other things, in determining whether the rates of a company "in general" are excessive, it is of no value whatever in determining the reasonableness of rates charged on any particular portion of the traffic carried by the company.

In other words, as hereinbefore shown, in order to determine whether the rates of a railroad company are reasonable, *its operations as a whole* must be considered.

LXXVII.

The "Estimated Cost of Carrying One Ton One Mile" On a Road Cannot be Used as a Standard of Reasonableness for the Rates of that Road on any Particular Traffic.

The "estimated cost of carrying one ton one mile" is ascertained by dividing the total expenses "assignable to the freight service" by the "number of tons carried one mile."

I have hereinbefore shown how to ascertain the "number of tons carried one mile." But it has been found impracticable to invent any satisfactory method of determining what proportion

of the total expenses of a railroad are properly "assignable to the freight service," as contradistinguished from the passenger service, the mail service, the express service, etc.

The total expenses of a railroad company are made up by adding together the expenses of—

1. Maintenance of way and structures;
2. Maintenance of equipment;
3. Conducting transportation;
4. General expenses;
5. Fixed charges.

There are ten subdivisions of expenses classified under "Maintenance of way and structures."

There are nine subdivisions of expenses classified under "Maintenance of equipment."

There are twenty-seven subdivisions of expenses classified under "Conducting transportation."

There are seven subdivisions of expenses classified under "General expenses," and

Four subdivisions of expenses classified under "Fixed charges."

See Classification of Operating Expenses as prescribed by the Commission, taking effect July 1, 1894.

It appears from the Fourth Annual Report on the "Statistics of Railways in the United States," for the year ending June 30, 1891, pp. 392, 393 and 438, that the expenditures of all the railways of the United States, which made reports to the Commission, were as follows:

For Maintenance of Way and Structures	$153,671,576	
For Maintenance of Equipment	117,047,895	
For Conducting Transportation	384,385,458	
For General Expenses	75,926,707	$ 731,887,893
Fixed Charges (p. 438)		326,886,541
Total Operating Expenses and Fixed Charges		$1,058,774,434

of which, 65.31 per cent. is assignable to "operation," and 34.69 per cent. is assignable to "fixed charges."

In order to ascertain the "estimated cost of carrying one ton one mile," it is necessary to apportion the items of expense assignable to "operation" between the passenger, mail, and express service, on the one hand, and the freight service on the other.

No rational basis for such an apportionment can be established in respect to a large number of those items.

For example: The expenses of repairs of roadway, repairs and renewals of bridges and culverts, repairs and renewals of fences, and repairs and renewals of telegraph, etc., etc., etc., have no known relation to the volume of passenger or freight traffic. Those expenses are not materially affected by the volume of traffic, either passenger or freight.

The above are only a few of very many of the items that cannot be properly apportioned between the passenger and freight traffic.

The Commission, having become convinced of the futility, not to say absurdity, of the attempt to apportion the expenses between the freight and passenger service, no longer requires railroad companies to go through the form of making such apportionments in their reports to the Commission. Such apportionments were required of the companies at the time this case was heard before the Commission, but since 1893 the Commission has not required the companies to make any such apportionments.

See Statistics of Railways, (1893), p. 81

The reason why it is impossible to apportion with accuracy the cost of service among the items of traffic is thus stated by the Commission In Re Southern Ry. & S. S. Association, sometimes cited as In Re L. & N. R. R.:

"First of all, when it is undertaken, there must be an appor-

tionment between the passenger traffic and the freight traffic; and if we suppose this to be made with reasonable accuracy, there must then be a like apportionment between the different kinds and classes of freight. Freight comes to a road in infinite variety; some heavy, some light, some in large packages, some in small, some perishable or of a special value and requiring peculiar accommodations and care; it is picked up in varying quantities at numerous stations, to be carried differing distances, sometimes on fast trains and sometimes on slow; the service is performed by men whose compensation differs, but the most of whom have something to do with all branches of the traffic, so that all assist in carrying it on over a road and by means of buildings, appliances, and equipment which have been provided for the whole. Any attempt to apportion the cost, therefore, would, at the best and under the most favorable circumstances, only reach an approximation *This is so well understood, the world over, that the propositions which from time to time have been made in other countries to measure the charges of the carrier by the cost of the carriage solely have always been abandoned after investigation.*"

1 Interstate Commerce Rep., p. 282, right col.

But if the cost could be ascertained, it could not be used as a rate-making factor. Upon this subject the Commission says:

"On the system of apportioning the charges strictly to the cost, some kinds of commerce which have been very useful to the country, and have tended greatly to bring its different sections into more intimate business and social relations, could never have grown to any considerable magnitude, and in some cases could not have existed at all, for the simple reason that the value at the place of delivery would not equal the purchase price with the transportation added. The traffic would thus be precluded, because the charge for carriage would be greater than it could bear. On the other hand, the rates for the carriage of articles which, within small bulk or weight, concentrate great value, would, on that system of making them, be absurdly low; low

when compared to the value of the article, and perhaps not less so when the comparison was with the value of the service in transporting them."

1 An. Rep., I. C. C. (1887), p. 30.

I have hereinbefore shown that an arbitary standard, such as the "average receipts per ton per mile," cannot be used for fixing *competitive* rates; and the same is equally true of the arbitrary standard styled the "estimated cost of carrying one ton one mile."

By reference to the tabulated statement filed as evidence by the appellee, and which is hereinbefore referred to, it will be seen that for the year 1893 the "estimated cost of carrying one ton one mile" on the Pennsylvania Railroad was 447-1000 of a cent, which, for the 900 miles from New York to Chicago, amounts to 20 cents per hundred pounds. The "estimated cost of carrying one ton one mile" on the New York Central Railroad during the same year was 514-1000 of a cent, which, for the 900 miles from New York to Chicago, amounts to 23 cents per hundred pounds.

Trans. p. 257.

If the rates of each of said roads are to be fixed in proportion to the "estimated cost of carrying one ton one mile," the New York Central Railroad must charge 3 cents per hundred pounds more than the Pennsylvania Railroad from New York to Chicago; and such a difference in rates would, upon certain classes of traffic, drive the New York Central Railroad out of competition.

LXXVIII.

Freight Rates are Governed by Commercial Laws, and Cannot be Constructed According to Mathematical Formulæ.

One of the chief errors into which the Commission has fallen in attempting to fix rates for carriers, as well as in attempting to

judge of the rates fixed by carriers, is in supposing that rates can be constructed according to certain mathematical formulæ; that some kind of an equation can be invented, in which certain statistical data can be arranged as factors, and that by the solution of such equations it can be ascertained what are reasonable rates on any given article of freight, for any given distance, on any given railroad. Among the factors which it has attempted to use in constructing such equations have been the "average receipts per ton per mile;" the "estimated cost of carrying one ton one mile;" the "number of tons carried of freight earning revenue;" the "average distance haul of one ton;" the "freight earnings per train mile," etc. But neither one, nor all, of such factors can be used in the practical business of rate-making."

Rates of freight are subject to the commercial law of supply and demand. Competition between rail lines and water lines; competition between product and product, and competition between market and market, are the factors which must govern railroad companies in the establishment of tariffs. No railroad freight tariff, not even local freight tariff, can now be established arbitrarily by a railroad company. In fact, as I have stated above, it cannot be said that railroad companies make their rates at all, at the present time. All that they can now do is to adjust them, from time to time, to the surrounding conditions and circumstances as they may exist; and no regard can be paid to any kind of mathematical formulæ, or scientific theories.

In Texas & Pacific Ry. Co. vs. I. C. C., known as the "Import case," this Court quotes from Wills, Judge, the following:

"I first observe that these are, in my judgment, eminently *practical* questions, and if this Court once attempts the hopeless task of dealing with questions of this kind *with any approach to mathematical accuracy* and tries to introduce a precision *which is unattainable in commercial and practical matters*, it would do infinite mischief and no good."

162 U. S., p. 225, T. & P. Ry. Co. vs. I. C. C.

This Court also quotes from Lord Herschell as follows:

"I quite agree with Mr. Justice Wills that it is impossible to exercise a jurisdiction, such as is conferred by this section, by any process of mere mathematical or arithmetical calculation. When you have a variety of circumstances, differing in the one case from the other, you cannot say that a difference of circumstances represents, or is equivalent to, such a fraction of a penny difference of charge, in the one case, as compared with the other. A much broader view must be taken, and it would be hopeless to attempt to decide a case by any attempted calculation. I should say that the decision must be arrived at broadly and fairly, by looking at all the circumstances of the case, that is, looking at all the circumstances which are proper to be looked at, etc."

162 U. S., pp. 227, 228, T. & P. Ry. Co. vs. I. C. C.
73 Fed. Rep., p. 421, I. C. C. vs. L. & N. R. R.
74 Fed. Rep., p. 721, I. C. C. vs. Ala. Mid. Ry. Co. et al.

LXXIX.

The Testimony of Expert Witnesses That the Chattanooga Rates are Reasonable.

The following named witnesses, all of whom are experts in traffic matters, testify that, in their opinion, the rates from New York and other Eastern cities to Chattanooga are just and reasonable:

Van den Berg. Trans. p. 131.
Guillaudeu. Trans. p. 143.
Davant. Trans. p. 153.
Culp. Trans. p. 159.
Brown. Trans. pp. 184, 185.
Lutz. Trans. pp. 188, 189.
Winburn. Trans. p. 193.
Knox. Trans. p. 197.
Biles. Trans. p. 214.

The reason given by the witnesses for their opinions are, among others, the following:

They are not higher than rates to surrounding points similarly situated.

Winburn. Trans. p. 193.
Lutz. Trans. pp. 188, 189.

They compare favorably with other rates for similar distances and services in the same territory.

Knox. Trans. p. 197.

They do not allow the carriers exorbitant revenue for the service performed.

Knox. Trans. p. 197.
Winburn. Trans. p. 193.

They are lower than would be charged by any other means of transportation.

Culp. Trans. p. 159.

They are the result of competition; though the competition has not been such as to reduce them as low as the Nashville rates.

Culp. Trans. p. 167.

Until this proceeding was instituted, no shipper had ever questioned their reasonableness.

Davant. Trans. p. 153.

They have been in effect for a long time, and are the outgrowth of years of experience and careful adjustment.

Davant. Trans. p. 153.

They are reasonable when measured by the service performed, the volume of traffic moved, and the rates to all other points similarily situated.

Guillaudeu. Trans. p. 143.

They are in line with the rates to Knoxville, Rome, Atlanta

and Dalton and other points doing business in competition with Chattanooga.

Culp. Trans. p. 159.
Van den Berg. Trans. p. 131.
Guillaudeu. Trans. p. 143.
Brown. Trans. p. 185.
Winburn. Trans. p. 193.
Knox. Trans. p. 197.
Biles. Trans. p. 214.

Property has moved freely under them, and business has been done under them at a profit.

Culp. Trans. p. 159.

It will be noticed that the reasons given by said witnesses for their opinions are eminently practical; and such as commend themselves to any one who considers rate-making as a commercial rather than a mathematical problem. And I submit that the plain, practical, commercial reasons given by said witnesses for their opinions are of infinitely more value than the mathematical calculations attempted by the Commission; and in which the Commission has attempted to use such statistical factors as the "average receipts per ton per mile;" the "estimated cost of carrying one ton one mile;" the "number of tons carried of freight earning revenue;" the "number of tons carried one mile;" the "average distance haul of one ton;" the "freight earnings per train mile," etc., etc.

In the cases of the Interstate Commerce Commission vs. the Western & Atlantic Railroad Company, et al., decided by the Fifth Circuit Court of Appeals on March 21, 1899, cases which involved the same questions as are involved in the case at bar, the Court, in speaking of the reasonableness of the rates in controversy in those cases, says:

"The most careful consideration of the testimony brought up in the records in these cases does not disclose any evidence that was offered by the appellant (the Commission) in the Circuit

Court tending to show that the rates, separately considered, to the respective points, are not reasonable and just; and the replies that were drawn by a most skillful cross-examination from the witnesses, called by the appellees (the Railroad Companies), do not show or tend to show that the rates to the respective points are not reasonable and just. On the contrary, the great volume of testimony, given by these witnesses (who show full competency to testify) is directly and clearly to the effect that the rates are reasonable and just. One witness gives as a reason for this opinion (for the subject is hardly susceptible of better proof than the opinion of experts), ... that the rates are lower than prevail in some of the other sections of the country, and lower than can be obtained by any other means of transportation, and are not higher than are charged from other points of distribution to stations on other railroads under similar circumstances and conditions. And another witness says the rates are 'just and reasonable, in that they are not unjustly or unreasonably high. They are lower than the rates at which the property can be transported by any other means of transportation. They have not prevented the shipment of freight. Traffic has been shipped with profit under these rates. They are just, relatively, to rates to other points in the State of Georgia similarly situated.' . . . . . These reasons do not convince the counsel for appellant (the Commission), but appear to us to have weight."

93 Fed. Rep. pp. 88, 89, I. C. C. vs. W. & A. R. R. Co.

LXXX.

Misconstruction Placed by Appellee's Counsel Upon Certain Testimony by Appellants' Witnesses as to the Reasonableness of the Nashville Rates.

Counsel for appellee, in his argument in the Court below, referred to certain statements made by appellants' witnesses on cross-examination. One of said statements was as follows:

"Q. (62). The haul from New York to Nashville is 151 miles longer than the haul to Chattanooga, is it not?"

"A. Yes, sir."

"Q. (63). Is the .91 cents rate to Nashville reasonable in and of itself?"

"A. I think so."

Trans. p. 138.

"Q. (67). Is a rate reasonable which does not yield the carrier a *proper* remuneration over and above *the cost of service?*"

"A. I do not believe carriers make rates below the *cost of transportation.* I would consider such a rate as unreasonably low."

"Q. (68). It would not then be a reasonable rate unless it yielded a *proper* remuneration over and above *the cost of service?*"

"A. It would be an unreasonably low rate."

Trans. p. 139.

Another of said statements was as follows:

"Q. (6). . . . . Are those rates to Nashville also reasonable, in and of themselves, in your opinion?"

"A. Yes, sir."

Trans. p. 186.

"Q. (9). Is a rate reasonable, in and of itself, which does not yield the carrier a *proper* remuneration over and above *the cost of service of carriage?*"

"A. I would say not. If carried for less than cost, it would be unreasonably low."

Trans. p. 186.

Another of said statements was as follows:

"Q. (3). Are the lower rates for the haul of 151 miles further, through to Nashville from New York and Boston, also, in your opinion, reasonable, in and of themselves?"

"A. Yes, sir; they are reasonable; brought about by active water competition to that point."

"Q. (4). Do these rates to Nashville yield the carrier a revenue in excess of *the cost of transportation?*"

"A. Yes, sir; I believe they do."

"Q. (5). Is a rate reasonable, in and of itself, which does not yield the carrier a *proper* remuneration over and above *the cost of service of carriage?*"

"A. No. I would not consider it a reasonable rate, if it did not yield the carrier sufficient revenue over and above *the cost of transportation.*"

Trans. pp. 189-190.

Upon such testimony, counsel for the appellee argued that if the Nashville rates yield the carrier "a *proper* remuneration," or "sufficient revenue," over and above "*the cost of service of carriage*," or "*the cost of transportation*," and if those rates are reasonable, in and of themselves, the higher rates charged to Chattanooga must yield the carrier an *excessive* "remuneration" over and above "*the cost of service of carriage*," or "*the cost of transportation*," and must, therefore, be unjust and unreasonable in and of themselves.

The argument, while plausible, is unsound. It assumes that there can be but two classes of rates, i. e., those which are "unreasonably low" and those which are "unreasonably high;" and that every rate must take one or the other of those classifications. It might as well be said that if the ocean is not at low tide, it must be at high tide; or it might as well be said that if the water in a river is not low, it must be high. In speaking of the tides, we have "high tide," "low tide," "mean tide," "spring tide," "neap tide," etc., with various gradations between them. So, in speaking of the stage of water in a river, we speak of "extreme high water," "low water," "extreme low water," etc.; and between "extreme high water" and "ex-

treme low water" there are as many gradations as there are fractions of an inch in the difference between the two. So a rate may be "high," "higher," or "very high;" or it may be "low," "lower," or "very low." It may be "low" without being "*unreasonably* low;" or it may be "high" without being "*unreasonably* high."

The argument also assumes that "a *proper* or *sufficient* remuneration over and above *the cost of service of carriage*," or "*the cost of transportation*," must refer to some *definite, fixed* per cent. of remuneration; and that any remuneration over or under that *fixed* per cent. must necessarily be *im*proper or excessive; but the phrase "*proper* or *sufficient* remuneration" is as flexible as the phrases "reasonable rate," "high tide," "low tide," "high water," "low water," etc.

Though a merchant may realize a "*proper* or *sufficient* remuneration" over and above the cost of a handkerchief when he sells it for 25 cents, it by no means follows that he would realize an *im*proper or excessive "remuneration" if he should sell its duplicate for 30 cents; so, though a farmer may realize a "*proper* or sufficient remuneration" over and above the cost of raising cotton when he sells a part of his crop at 7 cents per pound, it by no means follows that he would realize an *im*proper or excessive "remuneration" if he should sell the remainder of his crop at 9 cents per pound.

So, though the carriers in these cases may realize a "*proper* or sufficient remuneration over and above *the cost of the service of carriage*," or "*the cost of transportation*," from the rates charged to Nashville; and though they may realize a somewhat greater "remuneration over and above *the cost of the service of carriage*," or "*the cost of transportation*," from the rates which they charge to Chattanooga, the remuneration realized from the latter may be as "proper" as that which is realized from the former.

Mr. Winburn, in answer to a question whether, in his opinion, a rate is a reasonable rate "which does not yield the carrier

a proper remuneration over and above the *cost of the service of carriage*," said:

"That depends on what we call a *proper* remuneration above *the 'cost of the carriage.'* It seems to me there are a great many cases where a rate would be reasonable if it was above the *cost of carriage to any extent*, dependent largely upon the movement of traffic in different directions."

Trans. pp. 193, 194.

Mr. Culp said: "In my opinion a road is always justified in taking additional traffic, or traffic which it otherwise could not get, to the extent of making a rate as low as *the actual movement expense incurred in the movement of that traffic.*

Trans. p. 165.

Speaking of the Nashville rates, Mr. Culp said: "They might be higher and still be not unreasonably high. They might be as high as the rates to Chattanooga, and no doubt would be, if the lines through Chattanooga (working through Chattanooga) could alone fix the rates. But they meet competition around the other way—competition via the Ohio River.

Again he said: "I answer that they are above the additional *cost of transportation; that is to say, the actual movement expense of this particular traffic. . . . . They pay more than actual movement expense* incurred in the movement *of this particular traffic.* That is to say, the expense incurred as between moving this traffic and not moving this traffic."

Trans. p. 165.

Mr. van den Berg, speaking of the Nashville traffic, said: "I do not mean remunerative traffic, but traffic that pays over and above *the cost of handling it.*"

Trans. p. 138.

Mr. Lutz said: "There are times when we accept certain freight that we would not accept at other times. I will take the

local freight (train), for instance, that will run between Atlanta and West Point. That train has got to run. We have got to pay the engineer and we have got to pay the crew; and by adding on probably one or two more cars, or something of that kind, it probably would not add to the cost of the train but very little more."

Trans. p. 190.

The phrase, "*cost of service of carriage*" and the phrase "*cost of transportation*," as used by the witnesses, refer to the "*cost of movement of the particular traffic*;" and they do not include "*the fixed charges of the road*."

The distinction between "*the cost of movement* of the particular traffic" and the "whole cost of operation," which includes "*the fixed charges* of the road," as well as the operating expenses, is thus stated by the Commission in its First Annual Report, in commenting upon rates on long haul traffic: "By this, however, is meant only *the cost of movement of the particular traffic*, leaving out of view the *fixed charges of the road*, which must, in any event, be provided for, whether the long haul traffic is or is not taken. This distinction between *the cost of movement* and *the fixed charges* often becomes of importance in such cases as that of the lumber trade just mentioned. . . . . The *fixed charges* of the road may, for the purposes of illustration, be assumed to equal one-half of the whole (cost of operation), *the cost of movement* of freight the other half. The rates made were doubtless calculated to cover the whole (cost of operation), with a margin for profit, and were so laid that all traffic would contribute toward both *fixed charges* and *cost of movement*. But now comes this new business, and, from the nature of the case, low rates are a necessity to it; it can pay perhaps little, if anything, more than half what is paid by other traffic. But taking it will not increase perceptibly the *fixed charges* of the road, because those are made up of items that must be paid, whether the traffic is large or small. What is added to the cost by taking it (the traffic) is simply the expense *of its own handling and move-*

ment; and, upon the supposition made, there might perhaps be gain to the road, instead of loss, in taking it at anything above half the rates which are levied upon other traffic corresponding to it in classification. *It might, therefore, be carried at such rates without wrong to any one.*"

1 Annual Rep., I. C. C. (1887), p. 73.

To the same effect is the testimony of Mr. Culp, who said: "Now, there may be average cost, or estimated cost, *including fixed charges*; there is the cost which leaves out the fixed charges and takes (in) all other kinds of expense; then there is a *cost which pertains simply to the movement of a particular business*, (i. e.) a cost which is incurred only because that particular business is moved."

Trans. p. 165.

Mr. Culp, in speaking of the Nashville rates, said:

"I answer that they are above the additional *cost of transportation;* that is to say, the *actual movement expense of this particular traffic*, although they might be higher and still be not unreasonably high. . . . . They pay more than the actual *movement expense* incurred in the moving of this particular traffic. That is to say, *the expense incurred as between moving this traffic, and not moving this traffic.*"

Trans. p. 165.

When the witnesses say that the Nashville rates "yield the carriers a *proper* remuneration over and above *cost of the service of carriage*, or "*the cost of transportation*," they use those phrases as equivalent to the phrase "*the cost of movement*," which does not include "the fixed charges of the road."

It is manifest, however, that though the Nashville rates may pay a proper remuneration over and above "*the cost of movement*," or "*the cost of transportation*," the carriers would be justified in increasing them until they would also pay a proper remuneration over and above "*the fixed charges*," and they would doubtless increase them, if the Trunk Line competition at Nashville would permit.

LXXXI.

The Court of Appeals Based its Affirmance on the Fourth Section of the Act.

The Court of Appeals says:

"We conclude that the defendants are violating the *fourth* section of the Act in charging a higher rate from New York and other Eastern cities to Chattanooga than to Nashville. The order that enjoined them from doing so is therefore right. The decree of the Circuit Court affirming the order of the Commission is affirmed with costs."

Trans. p. 415.

I have hereinbefore shown that the Commission based its order exclusively on the fourth section (see ante p. 32); the Circuit Court based its judgment upon the third and fourth sections (Trans. p. 380); but the Court of Appeals, like the Commission, based its judgment upon the fourth section alone.

It follows that the first section, which relates to the reasonableness of rates, and the second section, which relates to unjust discrimination, are not properly before this Court for consideration.

LXXXII.

The Error of The Court of Appeals in Holding That Competition at Chattanooga is Stifled.

The Court of Appeals says:

"The Interstate Commerce Law, it is conceded, was intended to encourage normal competition. It forbids pooling for the very purpose of allowing competition to have effect. But it is not in accord with its spirit or letter to recognize as a condition justifying discrimination against one locality, competition

at a more distant locality *when competition at the nearer point is stifled or reduced,* not by normal restrictions, *but by agreement between those who otherwise would be competing carriers.* The difference in conditions thus produced is effected by a restraint upon trade and commerce, which is not only violative of the common law, but of the so-called Federal Anti-trust Act (citing cases). Certainly such a difference in conditions ought not to justify a difference in rates before the Commission or the Court."

Trans. pp. 412, 413.

The Commission found and reported that the rates from New York to Chattanooga, and twenty-four other Southern cities with which Chattanooga is grouped, "are established by the Southern Railway & Steamship Association, of which the defendant lines herein are members, and all traffic to those points is governed by the classification of that association."

Trans. p. 48.

The report of the Commission was filed December 30, 1892.

Trans. p. 37.

The Southern Railway & Steamship Association went out of existence and was succeeded by the Southern States Freight Association on or about October 21, 1895.

Trans. p. 168.

The case of the United States vs. Trans-Missouri Freight Association (166 U. S., 290) was decided by this Court on March 22, 1897, and on May 1, 1897, the Southern States Freight Association disbanded, and the Southeastern Freight Association was organized.

Trans. p. 168.

The articles of association under which the Southeastern Freight Association was organized will be found on p. 218 of the Transcript. Said association was organized "for the purpose of interchanging authentic information in regard to the tariffs of the respective parties," members thereof; and "for consultation

and mutual advice in regard to the reasonableness of tariffs and the publicity ofthe same."

Trans. p. 218.

The fourth article provides that a Conference Committee shall be constituted consisting of a traffic officer of each company. "Each company *reserving always to itself the right to take independent action on any subject*, agrees that any change in rates, rules or regulations affecting the traffic within the territory of the association proposed to be made by any company, shall be submitted to said Conference Committee by the company proposing to make such changes *for consideration and exchange of views* at least three days before the same shall take effect."

Trans. p. 219.

The ninth article provides that "nothing herein shall be so construed *as to establish or otherwise affect rates on freight traffic.*"

Trans. p. 220.

The second article provides that "the association shall be managed by an Executive Board, *which shall have no power to bind the members of the association to observe any regulation in restraint of trade.*

Trans. p. 219.

It is manifest upon the face of said articles that they were carefully prepared to comply in good faith with the decision of this Court in the Trans-Missouri case.

The Southeastern Freight Association has no power whatever to *make* freight rates; on the contrary it is expressly provided in said article that it shall have no power "to establish or otherwise affect rates on freight traffic."

Trans. p. 220.

Said association has no power whatever to *maintain* freight rates; on the contrary, it is expressly stipulated in said article that the Executive Board shall have no power to bind the *members* "to observe any regulations in restraint of trade," and that each

member "reserves to itself the right to take independent action on any subject."

Trans. p. 219.

The only provision in regard to making or maintaining freight rates is that each company agrees that three days before any change of rates which it may propose to make shall take effect, it will submit the same to the Conference Committee "for consideration and exchange of views"; but after such "consideration and exchange of views" are had, the company reserves the right "to take independent action" on the subject, and it may accept or reject the views or wishes of its associates, without violating any provision of the articles of the association; and without subjecting itself to the censure of its associates.

This Court has never decided that it is illegal or contrary to public policy for competing carriers to submit to each other their proposed changes in rates for "consultation and advice," where the carrier proposing the change reserves to itself the right to disregard the advice if it sees proper to do so.

The preamble to said articles declares that said association is organized for the purpose, among others, "of interchanging authentic information in regard to the tariffs of the respective parties."

Trans. p. 218.

The eighth article provides that the chairman shall "receive from the members of the association copies of any joint tariff or rate established by said members," and "compile, print and distribute such tariffs in conformity with the Interstate Commerce Act, and other laws;" that "the rules governing the filing of freight tariffs with the Interstate Commerce Commission shall apply as to filing all tariffs with the chairman;" and that the parties "shall file with the chairman all tariffs they may issue."

Trans. p. 220.

The tariffs which the members agree to file with the chairman of the association are the same as those which the sixth sec-

tion of the Act to Regulate Commerce requires, shall be printed, posted, and filed with the Interstate Commerce Commission.

The chairman of the association could obtain copies of them from the Commission; but it saves time and expense to file copies with the chairman, at or before the time that they are sent to the Commission.

One of the objects of the law in requiring tariffs to be printed, posted and filed, is to enable the competitors of a carrier to ascertain what rates are charged by it; and there can be no legal objection to competing carriers agreeing to furnish to each other information to which the law entitles them.

This Court has never held that it is illegal, or improper, for competing carriers to agree to furnish each other with copies of their tariffs, so long as there is no obligation imposed upon them to maintain such tariffs for any specified time, and so long as each of them reserves the right "by independent action" to change its tariff at any time, upon giving the notice prescribed by law.

The fifth article provides that "it shall be the duty of the chairman to discourage a reduction in rates by rebate, or drawback, or by payment of commissions, or by underbilling weights, or by any illegal device whatsoever, and upon complaint that such practices are being resorted to (he) shall make an investigation thereof, reporting the result to the Executive Board."

Trans. p. 219.

To enable the chairman to detect such illegal devices, the fifth article provides that the chairman and his representatives "shall be given access to all records of the companies that pertain to the traffic subject to the association." Trans. pp. 219, 220; and the ninth article provides that the Executive Board "shall report to the Federal and State Commissions any reduction in rates by any illegal device whatsoever."

Trans. p. 220.

The "illegal devices" which the chairman is directed to discourage are the same as those which are denounced by the second section of the Act to Regulate Commerce.

The sixth section of the Act provides that when a common carrier shall have established and published its rates, it shall be unlawful for it to charge any person a greater or less compensation than is specified in such published schedule of rates, so long as the same may remain in force.

The competitors of a carrier, as well as the public, are interested in seeing that the published rates of such carrier are charged so long as they remain in force; and the competitors, as well as the public, are interested in discouraging all secret rebates, or other illegal devices, by which a carrier may vary from its published schedule, so long as the same may remain in force.

This Court has never held that it is illegal, or improper, for competing carriers to agree to discourage "illegal devices" resorted to for the purpose of secretly reducing their published rates, so long as each of them reserves the right by independent action to reduce its rates publicly, by giving the notice prescribed by law.

I contend, with the utmost confidence, that there is nothing illegal or improper in the articles of the Southeastern Freight Association.

There is absolutely nothing in said articles to prevent any one of the appellants from reducing its rates from New York to Chattanooga whenever it may see proper to do so. Since said articles were signed, viz., May 1, 1897, there has been absolutely no agreement, either express or implied, which obligates the appellants or either of them to maintain the present rates, or any other specified rates, from New York to Chattanooga.

Prior to the decision of this Court in the Trans-Missouri case, and while the Southern Railway & Steamship Association was in existence, the rates from New York to Chattanooga were made and maintained by and under an agreement similar to the

one which this Court, in that case, held to be illegal; but since said decision, and since the Southeastern Freight Association has been in existence, there has been no agreement whatever to make or maintain rates. The fact that each of the appellants has continued to charge the same rates from New York to Chattanooga as were charged before said decision was made, is due alone to the fact that each of the appellants believes that said rates are just and reasonable in themselves, and that they do not give to Nashville any undue preference over Chattanooga.

I deny, therefore, that competition is stifled at Chattanooga by agreement between the appellants, as was erroneously held by the Court of Appeals.

I have shown in section LVI. that competition does in fact exist at Chattanooga; and that though it has not resulted in making the rates to Chattanooga as low as the rates to Nashville, it has resulted in making the Chattanooga rates very much lower than they would be if there were no competition at that point.

LXXXIII.

Even were it True That the Chattanooga Rates are Maintained by Agreement, the Fact Would not Preclude the Appellants from Accepting the Nashville Rates.

If it were true that appellants are operating under an agreement to maintain certain rates at Chattanooga, and to maintain certain lower rates at Nashville, a farther distant point, it might be claimed with some force, that they are responsible for both sets of rates, and therefore responsible for the relation which exists between them.

But while it is claimed that appellants are operating under an agreement to maintain certain rates at Chattanooga, it is not pretended that they are operating under any agreement in regard to the Nashville rates. It is perfectly well-known that it is im-

possible for the appellants to maintain by agreement, or otherwise, any specified rates at Nashville.

The Commission itself reports that appellants "have no voice" in determining the Nashville rates; that the Trunk Lines, in connection with the Louisville & Nashville R. R. established the Nashville rates "long before" the appellants "engaged in the Nashville business;" and the acceptance of the Nashville rates, so fixed by the Trunk Lines, is the "necessary condition" upon which the appellants can "compete for Nashville traffic."

Trans. p. 49.

As the appellants are compelled to accept the Nashville rates, as fixed by the Trunk Lines, and as it is impossible for appellants to increase the Nashville rates, it is wholly immaterial whether the Chattanooga rates are maintained by agreement between the appellants, or by their several and independent action.

It is only where the same carriers have the power to make both sets of rates that the existence of an agreement between them, to maintain certain rates at the shorter distance point, could be fairly urged as a reason for precluding them from accepting lower rates at a longer distance point.

LXXXIV.

The Error of the Court of Appeals in Construing My Argument as Contending that the Mere Existence of a Rate is a Justification of it.

The Court of Appeals says:

"It is argued that the fact of competitive lower rates at the more distant point speaks for itself, and that no amount of argument can demonstrate a similarity of conditions in the face of such a rate. This is only one of many arguments advanced on behalf of appellants which, reduced to their last analysis, involve as a major premise, that the existence of a rate and movement

of business under it are a complete justification of it and foreclose judicial investigation."

Trans. p. 412.

I do contend that where competition exists at one point, and no competition exists at another point, no amount of argument can demonstrate a similarity of conditions between those two points; but whether competition does or does not exist at either point, is a question for the Commission and the Courts.

I have never contended that the "mere existence of a rate and movement of business under it are a complete justification of it;" or that they "foreclose judicial investigation." On the contrary, I have always conceded that the Commission and the courts may investigate and determine whether competition exists at the longer distance point, whether it is actual, effective, and in good faith; whether it is such as to subserve the interests of the public, and of the carriers; whether the competitive rates pay more than the additional cost of movement; whether the shorter distance rates are reasonable, in and of themselves; and generally, that the Commission and the courts may investigate and determine any question of law or fact that may be involved in the controversy. I have never claimed that the mere existence of a rate is conclusive of anything in regard to its legality.

LXXXV.

The Error of the Court of Appeals in Stating that the Louisville & Nashville R. R. Co. Jointly Operates the Georgia Central Railroad & Banking Company's Road.

The Court of Appeals says:

"Nor can it be said that the Louisville & Nashville Company, whose fostering care of Nashville is insisted upon in the evidence and briefs for defendants, and is offered as a motive for its low rates to Nashville, is not a party to the plan by which Chatta-

nooga is prevented from enjoying the natural traffic advantages which her railroads and her situation ought to give her. For through its ownership of a majority of the stock of the Nashville, Chattanooga & St. Louis Railway Company, operating a road from Nashville through Chattanooga to Atlanta, *its joint operation of the Georgia Central & Banking Company from Atlanta to Savannah in connection with the Ocean Steamship Company*, of which the Georgia Central Company owns all the stock, it is very largely interested in traffic from the Eastern Seaboard to Chattanooga, and through Chattanooga to Nashville, and necessarily exercises an influence in shaping the action of the Southern Traffic Association in fixing rates. By its consent to the discrimination against Chattanooga it only furthers its purpose to favor Nashville, for it enables Nashville merchants to undersell those of Chattanooga to the north and west of that city."

Trans. p. 414.

It is true that the Louisville & Nashville R. R. Co. owns a majority of the stock of the Nashville, Chattanooga & St. Louis Railway Company; and that the latter company operates a road from Nashville, through Chattanooga, to Atlanta.

At the time the answers in this case were filed in the Circuit Court, the Louisville & Nashville R. R. Co., and the "Central Railroad & Banking Company of Georgia," as assignees of a lease jointly operated the road of the "Georgia Railroad & Banking Company," which latter road extends from Atlanta to Augusta.

Trans. p. 87.

The Court of Appeals confounded the "Central Railroad & Banking Company of Georgia" with the "Georgia Railroad & Banking Company."

The Louisville & Nashville R. R. Co. did jointly operate the road of the "Georgia Railroad & Banking Company"; but said road only extends from Atlanta to Augusta, and it does not

reach Savannah at all. The "Georgia Railroad & Banking Company" does not own any of the stock of the Ocean Steamship Company.

The "Central Railroad & Banking Company of Georgia" does own a railroad from Atlanta to Savannah, and it also owns all the stock of the Ocean Steamship Company, whose steamers ply between Savannah and New York.

The "Central Railroad & Banking Company of Georgia," through its ownership of the stock of said steamship company, controls a rail and water route from Atlanta to New York; and if the Louisville & Nashville R. R. Co. did, in fact, control the "Central Railroad & Banking Company of Georgia," the L. & N. R. R. Co. would control an important trunk line which would reach from Cincinnati via Nashville, Chattanooga, Atlanta and Savannah to New York, and such a line would exercise great influence in Southern traffic matters.

But the Louisville & Nashville R. R. Co. has never jointly, or severally, operated any portion of the road of the "Central Railroad & Banking Company of Georgia;" nor has it ever had any connection with the Ocean Steamship Co. There is not a scintilla of evidence in opposition to this averment; and the finding of the Court of Appeals to the contrary is a mistake, pure and simple.

The Louisville & Nashville R. R. has no ownership or control of any road east of Augusta. It does not reach the Atlantic Seaboard at any point; and of course it does not reach New York.

The materiality of the error of the Court of Appeals consists in this. If the Louisville & Nashville R. R. Co did in fact operate the road of the "Central Railroad & Banking Company of Georgia," which company owns the stock of the Ocean Steamship Company, the L. & N. Co. would control an unbroken line extending all the way from New York via Savannah, Chattanooga and Nashville to Cincinnati. It could (if we concede for

argument that ownership of majority of stock gives absolute control of operation) fix its own rates from New York to Nashville, as well as from New York to Chattanooga, without consulting any one; and if it possessed that power it might be held responsible for the relation which exists between those two sets of rates. But as the L. & N. R. R. does not control any road north of Cincinnati, nor east of Augusta, it cannot reach New York at all. It cannot fix the rates even from New York via Cincinnati to Nashville; because in making the rates which it accepts from New York, via Cincinnati to Nashville, it is compelled to use such rates as the Northern Trunk Lines see proper to charge from New York to Cincinnati.

And if the Louisville & Nashville R. R. Co. were to attempt to make rates from New York, via Augusta, to Chattanooga it would be compelled to use such rates as the lines east of Augusta saw proper to charge from New York to that point.

LXXXVI.

The Error of the Court of Appeals in Supposing that There is a Plan in Existence to Deprive Chattanooga of Her Natural Advantages.

The Court of Appeals accuses the Louisville & Nashville R. R. Co. of "being a party to the plan by which Chattanooga is prevented from enjoying the natural traffic advantages which her railroads and her situation ought to give her."

Trans. p. 414.

The Court af Appeals states that eight railroads enter Chattanooga.

Trans. p. 408.

It states that Chattanooga has "at least three through competing Southern lines from New York under different managements."

Trans. p. 413.

It states that the Southern Railway, (which is one of the most powerful corporations in the South) owns one line which extends from Chattanooga to Bristol; and thence forms lines all rail through Hagerstown or Alexandria, or rail and water via Norfolk; and another line which extends from Chattanooga to Atlanta, where it connects with numerous lines via the South Atlantic ports.

Trans. p. 408.

The L. & N. R. R. Co. has no interest in, or control over, any one of the eight railroads which enter Chattanooga, except that it owns a majority of the stock of the Nashville & Chattanooga Railway, which operates the Western & Atlantic Railroad under a lease.

None of the remaining six railroads which enter Chattanooga enter Nashville, or are in any wise interested in Nashville's success as a city. On the contrary, as between Nashville and Chattanooga the interests of said six railroads would naturally incline them to prefer Chattanooga.

It is absolutely ridiculous to suppose that those six railroads (which include the powerful Southern Railway) would permit the Louisville & Nashville R. R. Co. to deprive Chattanooga of "the natural traffic advantages which her railroads and her situation ought to give her."

If, as the Court of Appeals states, Chattanooga has "three competing Southern lines from New York under different managements," either one of these three lines can, at any moment, if it desires to do so, reduce the rates from New York to Chattanooga, so as to make them not higher than the Nashville rates; and the Louisville & Nashville R. R. would be powerless to prevent it, even if it were disposed to do so.

LXXXVII.

The Error of the Court of Appeals in Supposing that the Louisville & Nashville R. R. Co. is Actuated by a Desire to Favor Nashville to the Detriment of Chattanooga.

Speaking of the Louisville & Nashville R. R. Co., the Court of Appeals says: "By its consent to the discrimination against Chattanooga it only furthers its purpose to favor Nashville, for it enables Nashville merchants to undersell those of Chattanooga to the north and west of that city."

Trans. p. 414.

As the Louisville & Nashville R. R. Co. has no voice in making the rates from New York to Chattanooga, it cannot be justly charged with any discrimination that may arise from the fact that certain specified rates exist at that point.

In making rates from New York, via Cincinnati, to Nashville, while the Louisville & Nashville R. R. Co. did adjust them so as to enable Nashville to compete with Louisville and Evansville in the territory north and west of Nashville, the Louisville & Nashville R. R. Co. was not actuated by any desire to injure Chattanooga. Such injury as may have resulted to Chattanooga was merely incidental to an adjustment of rates which the Louisville & Nashville R. R. Co. had the perfect right to make in order to protect one of its terminal cities against other cities with which it competed. The Court of Appeals thinks that Chattanooga has the right to compete with Nashville in the territory north and west of Chattanooga; and if that be so, Nashville has the right to compete with Louisville and Evansville in the territory north and west of Nashville.

The rates from New York to Louisville and Evansville are now materially less than the rates from New York to Nashville (Trans. p. 42); and if the L. & N. R. R. Co. had not made the

adjustment of rates to Nashville upon the present basis, it would have been impossible for Nashville to have competed in the territory north and west of her.

If, as the Court of Appeals concedes, "the Interstate Commerce Law was intended to encourage normal competition," how can the object of the law be attained unless each and every railroad be allowed to make such rates to and from the cities and towns located upon its lines, as will enable them to compete successfully with rival markets located upon rival lines?

The competition which has existed between our numerous rail lines, where each one of them has attempted to promote the interests of its own cities and towns, has contributed more than all other causes combined to the improvement and development of this country as a whole.

LXXXVIII.

The Error of the Court of Appeals in Supposing that Chattanooga Ought to be Given Northern Rates.

The Court of Appeals says:

"The business of the East and West Trunk Lines north of the Ohio River is so great that the rates of freight in force on them are generally much lower (perhaps 33⅓ per cent.) than those in force on the Southern lines, which embrace, generally, all lines in the States south of the Ohio and east of the Mississippi."

Trans. pp. 404, 405.

"The Louisville & Nashville Railroad Company, though a Southern line, has put in force from Cincinnati to Nashville, a distance of 295 miles, the Trunk Line rates, so that freight rates on merchandise coming to Nashville by way of Cincinnati are substantially less than they would be were the usual Southern rates of freight charged from Cincinnati to Nashville."

Trans. p. 405.

"Chattanooga is 330 miles from Cincinnati, with which it is connected by the Cincinnati Southern Railway, under lease to the Cincinnati, New Orleans & Texas Pacific Railway Company. The latter does not charge East and West Trunk Line rates on through business from New York to Chattanooga, but fixes its rates according to the Southern tariff, though they are less than the local rates, and in this way Chattanooga rates from the East through Cincinnati are maintained on a Southern basis."

Trans. p. 405.

Again the Court says: "The truth is that Chattanooga is too advantageously situated with respect to her railway connections to the North and East to be made the first city of importance to bear the heavier burden of Southern rates, when Nashville, her natural competitor, is given Northern rates. The line of division between Northern and Southern rates ought not to be drawn so as to put her to the south of it, if Nashville is to be put to the north of it."

Trans. p. 405.

As business in the Trunk Line territory, north of the Ohio River, is very much greater than it is in Southern territory, it is evident that Southern railroads cannot, *as a general rule*, work for as low rates as the Northern railroads can afford to accept.

I have heretofore shown that the L. & N. R. R. Co. was forced to make Nashville an exception to the general rule, and accept Northern rates from Cincinnati to Nashville on New York traffic, in order to prevent Louisville and Evansville from driving Nashville out of competition in the territory north and west of Nashville.

The Court of Appeals thinks that the Cincinnati, New Orleans & Texas Pacific Railway ought to make a similar exception in the case of Chattanooga, and accept Northern rates from Cincinnati to Chattanooga, on New York traffic, so as to prevent Nashville from driving Chattanooga out of competition in the territory north and west of Chattanooga.

It is manifest, however, that if the C., N. O. & T. P. Ry. should act as suggested by the Court, and reduce the rates from New York via Cincinnati to Chattanooga to the same as the Nashville rates, all of the Southern lines which carry New York traffic to Chattanooga must accept whatever rates the C., N. O. & T. P. Ry. might fix. Whether New York traffic were carried all rail via Hagerstown through Bristol to Chattanooga, or all rail via Alexandria through Atlanta to Chattanooga, or water and rail through Norfolk, Charleston, Savannah or Brunswick, and thence to Chattanooga, each and all of those Southern lines would be forced to accept the same rates from New York to Chattanooga as might be fixed by the C., N. O. & T. P. R'y. via Cincinnati. In a word, all of those Southern railroads would be forced to carry New York traffic to Chattanooga at Northern rates.

Again: the Court of Appeals concedes that Chattanooga is grouped with twenty-four Southern cities and towns which take the same rail and water rates as Chattanooga on New York traffic.

Trans. pp. 405, 406.

If the Southern lines be forced by the C., N. O. & T. P. Ry. to accept Northern rates on New York traffic to Chattanooga, they must accept the same rates from New York to the twenty-four cities and towns with which Chattanooga is grouped. The result would be to force the Southern lines to accept Northern rates on all traffic from New York and other North Atlantic cities destined to any interior point in Southern territory.

The solitary exception which the Louisville & Nashville R. R. Co. was forced to make in the case of Nashville would become the general rule for Southern rate making; and rates all over the South would be reduced to the level of Northern rates.

"The line of division between Northern and Southern rates" must be drawn somewhere.

The carriers who represent opposing interests have thought that the line ought to be drawn north of Chattanooga. The

numerous and powerful rail lines which enter Chattanooga, and which are willing and able to protect her as against Nashville, or any other city, do not believe that they can reduce the Chattanooga rates unless they also reduce the rates to the cities and towns with which she is grouped; and as that would practically necessitate a reduction of all rates in Southern territory to the level of Northern rates, they do not feel that they ought to be required to make such an enormous sacrifice of revenue.

LXXXIX.

The Error of the Court of Appeals in Supposing that the Cincinnati, New Orleans & Texas Pacific Railway is Under Agreement Not to Lower its Rates from New York to Chattanooga.

The Court of Appeals says:

"The Cincinnati, New Orleans & Texas Pacific Railway has been a member of this association (i. e. an association of the Southern Railway and Steamship Companies), and it is the agreement between it and the other lines at Chattanooga which has prevented the lowering of the New York rate. Without such an agreement it is not possible to see why normal competition would not give Chattanooga substantially the same rates as Nashville."

Trans. p. 413.

I have hereinbefore shown that the Southern lines, immediately after the decision of this Court in the Trans-Missouri case, and without waiting for the decision in the Joint Traffic Association case, promptly dissolved the association which had previously existed, and formed a new one which complies in all respects with the law as announced in those cases.

Since May 1, 1897, the C., N. O. & T. P. Ry. has not been under any agreement with any one to maintain any specified rates from New York to Chattanooga. It is at perfect liberty to

reduce them at any moment, by its "independent action," upon giving the notice required by law.

The reason why the C., N. O. & T. P. Ry. does not reduce its rates from New York to Chattanooga is this: If the New York rates to Chattanooga be reduced the twenty-four cities and towns with which Chattanooga is grouped must have as low New York rates as Chattanooga.

The C., N. O. & T. P. Ry., through its connections, carries traffic to all of those cities and towns, and her loss of revenue on that traffic would be very great.

The C., N. O. & T. P. Ry., through its connections, also carries traffic to many other cities and towns located in different parts of the Southern territory; and it is vitally interested in preventing a general reduction of rates throughout the Southern territory to the level of Northern rates.

An intelligent consideration of its own interests has induced the C., N. O. & T. P. Ry. to continue, by its independent action, a policy which is the only one that will save it from great financial loss. Respectfully submitted,

ED BAXTER,
of Counsel for Appellants.

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No. 481

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OCTOBER TERM, 1899.

No. 481.

THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY, THE NORFOLK & WESTERN RAILROAD COMPANY et al., Appellants,

vs.

THE INTERSTATE COMMERCE COMMISSION, Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF

MR. BAXTER of Counsel for Appellants.

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REPLY BRIEF OF

ED. BAXTER of Counsel for Appellants.

Since the oral argument I have received a copy of a "Supplemental Brief in behalf of Appellee," and I respectfully request permission to file this as a reply brief in behalf of Appellants.

I.

THE LINE FROM THE EASTERN SEABOARD VIA CINCINNATI TO NASHVILLE AND THENCE TO CHATTANOOGA IS NOT INVOLVED IN THE ORDER OF THE COMMISSION.

See said supplemental brief p. 5.

The line from the Eastern seaboard, via Cincinnati to Nashville, and thence to Chattanooga, is composed, in part, of a por-

tion of the Louisville & Nashville Railroad, which extends from Cincinnati to Nashville, a distance of 295 miles.

Trans. p. 45.

The Louisville & Nashville Railroad Co., *in its character as owner of the road from Cincinnati to Nashville*, was not made a party to the petition filed by the Board of Trade of Chattanooga before the Commission (Trans. p. 9.), nor was it made a party to the petition filed by the Commission in the Circuit Court.

Trans. p. 2.

No complaint was made, in either petition, that the Louisville & Nashville R. R. Co. was guilty of any wrong in accepting such rates on Eastern traffic to Nashville, as would enable Nashville to compete with Louisville and Evansville.

There was no charge in either petition that the Louisville & Nashville R. R. Co., *in its character as owner of the road from Cincinnati to Nashville*, participates in the carriage of Eastern traffic through Chattanooga to Nashville, or that it has any voice in making the rates on Eastern traffic through Chattanooga to Nashville.

The only character in which the Louisville & Nashville R. R. Co. was made a party, and the only character in which any complaint was made against it, in either petition, was in its character as one of the two assignees of the lease of the Georgia Railroad, which runs from Atlanta to Augusta, Ga., and which does not reach either Chattanooga or Nashville.

Trans. p. 87.

The Georgia Railroad is only one of several links in a line from the Eastern Seaboard, through Charleston and Atlanta, to Chattanooga, and thence to Nashville. It does not and cannot participate in the carriage of traffic from the Eastern Seaboard, through Cincinnati, to either Nashville or Chattanooga.

II.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY DID NOT COME INTO THE CASE VOLUNTARILY.

Counsel, on page 6 of their supplemental brief, state that the Louisville & Nashville R. R. Co. "came in voluntarily and filed its answer," etc.

This statement is misleading.

The petition before the Commission was filed against the "Georgia Railroad" (Trans. p. 9.), and the petition in the Circuit Court was filed against the "Georgia Railroad Company." (Trans. p. 2.)

There is no such corporation as the "Georgia Railroad Company."

There is a corporation named the "Georgia Railroad & Banking Company," which owns a railroad extending from Atlanta to Augusta. Said railroad was leased to Wm. M. Wadley for 99 years; and he assigned the lease to the Louisville & Nashville R. R. Co. and the Central Railroad & Banking Company of Georgia, by whom said railroad was jointly operated under the trade name of the "Georgia Railroad."

The Louisville & Nashville R. R. Co. and the Central Railroad & Banking Company of Georgia, having been "sued by the name of the Georgia Railroad Company," in regard to the railroad between Atlanta and Augusta, filed their joint and several answer in the Circuit Court as assignees of the lease of said road.

Trans. p. 87.

The Louisville & Nashville R. R. Co. made no appearance in the case, except in its character as co-assignee of the lease of said Georgia Railroad. It made no appearance in its character as owner of the road between Cincinnati and Nashville. And the appearance which it made as co-assignee of the lease of the

Georgia Railroad was not "voluntary;" because it and its co-assignee were actually sued under their trade name of the "Georgia Railroad Company."

III.

The Eastern Rates via Cincinnati to Nashville are Not Attributable Solely to the Louisville & Nashville Railroad.

Counsel, on p. 7 of their supplemental brief, state that "it is admitted that the low rates by the line via Cincinnati to Nashville are attributable solely to the Louisville & Nashville Railroad."

This is an error.

On p. 64 *et seq.* of my original argument, I showed that the eastern rates via Cincinnati to Nashville are divided between the Trunk Line roads north of the Ohio River, and the Louisville & Nashville Railroad south of that river, in certain proportions; and that the Trunk Lines get $\frac{5}{7}$ of the total first-class rate. The low eastern rates, via Cincinnati to Nashville, are therefore attributable to the Trunk Lines in a much greater degree than they are attributable to the Louisville & Nashville Railroad Company.

IV.

The Louisville & Nashville R. R. Co. Would Not Violate the Third Section of the Act by Continuing to Accept Its Present Rates to Nashville.

Counsel, on p. 9 of their supplemental brief, say that "if the Louisville & Nashville Road should continue low rates to Nashville from Cincinnati, it would violate section 3 of the law in maintaining higher rates to Chattanooga, on the line via Augusta to Chattanooga."

The Commission reported that the Trunk Lines and the Louisville & Nashville Railroad "united in joint tariffs from Eastern points to Nashville long before the lines through Chattanooga engaged in the Nashville business;" and that "the acceptance of the rates so fixed by the rail lines via Cincinnati was the necessary condition upon which the lines via Chattanooga could compete for Nashville traffic."

Trans. p. 49.

The proposition of counsel amounts, therefore, to this: That if the Louisville & Nashville R. R., and its Trunk Line connections north of the Ohio river, continue to charge the same rates as they were charging long before the lines through Chattanooga began to compete for Nashville traffic, the Louisville & Nashville R. R. Co. will violate the third section, unless it causes the rates to be reduced from the East, via Augusta, to Chattanooga, to the level of the Nashville rates.

The Louisville & Nashville R. R. Co. owns a majority of the stock of the Nashville, Chattanooga & St. Louis Ry.; the N., C. & St. L. Ry. operates the Western & Atlantic Railroad from Chattanooga to Atlanta; and the Louisville & Nashville R. R. Co. is one of the assignees of the lease of the Georgia Railroad extending from Atlanta to Augusta.

Assuming, though only for the sake of argument, that such interest as the Louisville & Nashville R. R. Co. has as a stockholder in the N., C. & St. L. Ry, and as co-assignee of the lease of the Georgia Railroad, gives it such power of control over the line of road between Chattanooga and Augusta as to make it responsible for the rates that are charged from Augusta to Chattanooga, it cannot be held responsible for the rates charged *from New York to Chattanooga*. It has no shadow of interest in the line between New York and Augusta; and yet that line must necessarily be consulted in fixing rates from New York, via Augusta, to Chattanooga.

If the Louisville & Nashville R. R. Co. owned a line from New York, via Augusta, to Chattanooga and Nashville, it might be held responsible for the relative adjustment of rates as between Chattanooga and Nashville.

But the Louisville & Nashville R. R. Co. has no interest in any line north of Cincinnati, nor in any line east of Augusta. It, therefore, can neither control the rates from New York, via Cincinnati, to Nashville, nor the rates from New York, via Augusta, to Chattanooga.

It is only where the same carrier controls the rates to both of the cities affected that it can be charged with undue preference between them under the third section.

4 I. C. Rep., p. 65; Eau Claire Board, etc., vs. C. M. & St. P. Ry. et al, 4th head note.

V.

The Commission Did Not Order the Chattanooga Rates to be Reduced.

Counsel, on p. 10 of their supplemental brief, say that the natural and proper mode of complying with the order is to reduce the Chattanooga rates.

Neither the Commission, nor the Circuit Court, nor the Court of Appeals, ordered any reduction whatever in the Chattanooga rates.

Trans. p. 57, 381, 393.

All three of said tribunals ordered that the Chattanooga rates shall not be higher than the Nashville rates, but neither of them ordered the equality of rates between those two cities to be effected by reducing the Chattanooga rates to the level of the Nashville rates.

On the contrary, the Commission said that "the allowance of the same rate to the shorter distance point (i. e., Chattanooga) might reduce their revenue (i. e., the revenue of the lines operating through Chattanooga) *below the limits of fair compensation.*"

Trans. p. 53, 54.

VI.

This Court Has No Power to Make a New Order Substantially Different From the Order Made by the Commission.

Counsel, on p. 14 of their supplemental brief, contend that this Court has the power "to change or modify the order" that was made by the Commission in this case.

In the case of I. C. C. vs. Detroit, G. H. & M. Ry. Co., it was said by Judge Severens in his dissenting opinion, as follows:

"The Court is not authorized to make any general order or decree upon the matters at large as they shall appear before it, but is given power simply to award its process if it judicially approves the order of the Commission. If it does not find it to have been warranted by law, its power and duty are at an end."

57 Fed. Rep., 1013, 1014.

He also used the following language: "But, as already said, the Court can make no new order. The order of the Commission stands or falls as made."

57 Fed. Rep., p. 1019.

See also 83 Fed. Rep., p. 267, Farmers' Loan & Trust Co. vs. N. P. Ry. Co.

The proposition thus announced by Judge Severens was affirmed by the U. S. Circuit Court of Appeals for the Sixth Circuit, in 74 Fed. Rep., p. 805. The fourteenth head note of the opinion of that Court is as follows:

"The power given to the courts to compel obedience to the 'lawful order' of the Commission, being special and statutory, is strictly limited to the power conferred; and consequently the courts can only grant or refuse compulsory obedience to the order, and have no authority to modify or change it."

74 Fed. Rep., p. 805, D. G. H. & M. Ry. Co. vs. I. C. C.

In the case of I. C. C. vs. D. L. & W. R. Co. et al., in the Circuit Court for the Northern District of New York, Wallace, Circuit Judge, in speaking of the power of the Circuit Court, said:

"The Court cannot substitute, for an order actually made, one such as the Commission might or should have made, or such as the Commission intended to, but failed to, make. This Court has no revisory power over the orders of the Commission. Its function in a proceeding like this is merely to inquire whether the respondents, the common carriers, have refused or neglected to perform any lawful order or requirement of the Commission. It cannot undertake to decide whether the respondents have violated one which the Commission might have lawfully made."

I. C. C. vs. D. L. & W. R. Co., 64 Fed. Rep., p. 723.

Counsel, on page 162 of their original argument, refer to the following language in the opinion of the Circuit Court in what is known as the "Social Circle case:"

"The Commission denies the power of this Court to hear the case upon any other issues, pleadings, or facts, than those presented to the Commission. It is claimed that the case is to be determined with reference to what the Interstate Commerce Commission had before it, and that no additional issues or questions should be raised, *or other evidence taken.* The language of the act of Congress does not support this contention. . . . This question may be considered, therefore, as settled, not only by the language of the act of Congress, but by authority, against the position assumed by counsel for the Commission."

I. C. C. vs. C. N. O. & T. P. Ry. Co, 56 Fed Rep., pp. 934, 935.

In the "Social Circle case," counsel for the Commission did not assume the position that the Circuit Court had the power to modify an order made by the Commission, or to make a new order of its own. No such question was involved in that case. The question with reference to which the language just quoted was used by the Court was whether the Circuit Court, in its ex-

amination into the legality of an order, as made by the Commission, was restricted to the pleadings and evidence used before the Commission, or could consider new and additional evidence taken for the first time in the Circuit Court.

Counsel, on page 163 of their original argument, quote the following language from the opinion of this Court in the case of Interstate Commerce Commission vs. Alabama Midland Railway et al., 168 U. S., p. 175, viz.:

"It has been uniformly held by the several Circuit Courts and the Circuit Courts of Appeal in such cases that they *are not restricted to the evidence adduced before the Commission*, nor to a consideration merely of the power of the Commission to make the particular order under question, but that *additional evidence may be put in by either party*, and that the duty of the Court is to decide, as a court of equity, upon the entire body of evidence."

It is as true of the "Alabama Midland case," as it is true of the "Social Circle case," that counsel for the Commission did not assume the position that the Circuit Court had the power to modify an order made by the Commission, or to make a new order of its own. No such question was involved in either of those cases. The question with reference to which the language above quoted was used by the Court in both cases, was, whether the Circuit Court, in its examination into the legality of an order as made by the Commission, was restricted to the pleadings and evidence used before the Commission, or could consider new and additional evidence taken for the first time in the Circuit Court.

Counsel, on p. 162 of their original argument, quote the following language from the opinion of Judge Sage in I. C. C. vs C. N. O. & T. P. Ry. Co. et al., known as the "Cincinnati and Chicago Freight Bureau cases," viz.:

"The Court is to sit as a court of equity, without the formal proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises. It is so provided in

section 16 of the act. The intention of Congress evidently was to vest in the Court a large discretion."

64 Fed. Rep. pp. 984, 985.

In those cases, counsel for Commission did not assume the position that the Circuit Court had the power to modify an order made by the Commission, or to make a new order of its own. No such question was involved in those cases. The question with reference to which the language above quoted was used by the Court, was whether the Circuit Court, in its examination into the legality of an order made by the Commission, could consider a transcript of the testimony taken before the Commission as a part of the record. See 64 Fed. Rep., p. 983. His Honor held that though the testimony taken before the Commission was not a part of the record, either party should be allowed to use as evidence any testimony taken before the Commission, which is competent and relevant. Such action was regarded by the Court as a proper exercise of the "large discretion" vested in it by the Act; and it was considered by the Court as doing "justice in the premises" to allow either party to use the testimony taken before the Commission, though it was not technically a part of the record. The question as to whether the Court had power to modify an order made by the Commission, or to make a new order of its own, was not discussed by counsel nor considered by the Court in those cases.

Counsel, on p. 163 of their original argument, quote the following language used by Judge Lurton in the case of Shinkle, Wilson & Kreis Co. vs. L. & N. R. R. Co. et al., 62 Fed. Rep., p. 693, viz.:

"If it shall then appear, on all the evidence heard and submitted, that the order of the Commission *was lawful* and reasonable, and that it has been violated, it shall be lawful for such Court to issue a writ of injunction, or other proper process, to prevent further disobedience of such order. Now, it is well settled that the Court is not the mere executioner of the orders of the Commission. The suit in this Court is an original and independent proceeding. This Court is not confined to a mere

examination of the matter as heard by the Commission. It proceeds to hear the complaint *de novo*."

In that case, counsel for the complainants did not assume the position that the Circuit Court had the power to modify an order made by the Commission, or to make a new order of its own. No such question was involved in that case. The question with reference to which the language just quoted was used by the Court, was whether the Court was bound to issue a *preliminary* injunction to compel a carrier to obey an order made by the Commission in reference to freight rates, where the answer of the carrier denied that said rates were unreasonable or unjust, and denied the legality of said order.

Reference may be made to the following language from the opinion of this Court in the case of I. C. C. vs. Alabama Midland Ry. Co. referred to above:

"Much less do we think that it was the intention of Congress that the decision of the Commission, if applied to, could not be *reviewed* by the Court. The provisions of section 16 of the Act, which authorize the Court to 'proceed to hear and determine *the matter* speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner *as to do justice in the premises*, and to this end such court shall have power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the Court may think needful, to enable it to form *a just judgment in the matter of such petition*,' extend as well to an inquiry or proceeding *under the fourth section* as to those arising under the other sections of the Act."

The italics are mine.

In using the language just quoted, this Court was not discussing the question as to whether the Circuit Court can modify or change an order as made by the Commission; and therefore, it had no idea of disapproving the proposition announced by Judge Severens, and affirmed by the Court of Appeals in the case of I. C. C. vs. D. G. H. & M. Ry. Co. referred to above.

In using the language just quoted from the opinion in the Alabama Midland Ry. case, this Court was merely combatting an argument which had been pressed upon the Court by counsel for the Commission to the effect that, *under the fourth section*, the action of the Commission was conclusive, and could not be reviewed by the courts at all. This Court decided, however, that the power of *review* by the courts extends "as well to an inquiry or proceeding *under the fourth section*, as to those arising under the other sections of the Act."

168 U. S., p. 174.

The power of "*review*" referred to by this Court is confined to a "review" of the question as to whether the order as made by the Commission is lawful. If upon such a "review" the Court finds that the order is lawful, it awards its process to enforce it. If upon such "review" the Court finds that the order as made is not warranted by law, the power and duty of the Court are at an end.

"*The matter*" which the Court is authorized to "*hear and determine*," and "*the premises*" in which the Court is to "*do justice*," and "*the matter of such petition*," in which the Court is "to *form a just judgment*," all mean one and the same thing, viz., "to hear and determine," and "to form a just judgment" on the question whether the order, *as made by the Commission*, *is lawful* or not.

The sixteenth section of the Act to Regulate Commerce provides that whenever any common carrier shall refuse or neglect to perform "any *lawful* order or requirement of the Commission," the Commission, or any one else, may apply to the Circuit Court of the United States, and said Court "shall have power to hear and determine the matter" "speedily as a court of equity," "in such manner as to do justice in the premises." The Court may prosecute all such inquiries as may be needful to enable it "to form a just judgment in the matter of such petition;" and if it be made to appear to such court on such hearing or on report of any such person or persons, that the *lawful* order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction," etc.

It will be seen that the jurisdiction of the Circuit Court, *under section* 16, is confined to the enforcement of a LAWFUL order made by the Commission; and that said court is not authorized to make a new order of its own.

I concede that the Commission may assign an erroneous reason for making an order, and yet the order may, for other reasons, be lawful; and that, in such case, it is the duty of the Court to enforce it; but I contend that the Court has no power to enforce an order of the Commission which is *not lawful*; nor to make an order of its own, under section 16, which is *substantially* different from the order made by the Commission.

Under sections 8 and 9 of the Act to Regulate Commerce, any one who complains that the Act has been violated by a common carrier is given an action for damages in the courts of the United States. But if instead of resorting to those courts he elects to apply to the Commission, as he may do under section 16, he must be prepared to maintain the *lawfulness* of such order as the Commission may make in his behalf; or he cannot demand of the Circuit Court an enforcement of the order.

Section 9 provides that any person shall have the right to pursue his remedy in court, or his remedy before the Commission; but that he shall not have the right to pursue both remedies. According, however, to the contention of counsel for the appellee a party may elect to apply to the Commission, and having obtained an order from it he may, under section 16, apply to the Court for an enforcement of the order; and notwithstanding the Court may be of the opinion that the order of the Commission is unlawful, it is the duty of the Court to give to the party all the relief to which he would have been entitled, if he had, in the first instance, applied to the Court under sections 8 and 9 of the Act. If the contention of counsel be correct, the party, instead of being forced to elect between the Commission and the Court, obtains the advantage of the jurisdiction of the Court, as well as that of the Commission.

In the case at bar, Judge Severens did not hold that the Court had the right to "modify the order of the Commission"

or to make a "new or different order" of its own. Speaking of the order made by the Commission in that case, he said:

"The legal reason given may be wrong and the order right, if, upon the facts, the latter (i. e., the order) should be found by the Court TO BE WARRANTED BY LAW. Nor would it affect the duty of the Court if the Commission had founded its order upon one provision of the Act, and the facts brought the case within some other. THE QUESTION, THEREFORE, IS WHETHER THE ORDER MADE WAS A LAWFUL ONE *in the circumstances as they are made to appear.*"

Trans., p. 370.

In the case just cited, Judge Severens did not "modify the order of the Commission," nor did he make a "new or different order" of his own. On the contrary, he "ordered, adjudged, and decreed that *the order* MADE BY THE INTERSTATE COMMERCE COMMISSION be in all things affirmed and made the order of this Court," etc.

Trans. p. 381.

VII.

COMPETITION BETWEEN MARKETS MAY BE CONSIDERED BY CARRIERS IN ADJUSTING THEIR RATES.

During the oral argument, Mr. Justice White asked me a question, which, as I understood it, was this:

"If there be no competition at Nashville except as between the Louisville & Nashville R. R. Co. and the Nashville, Chattanooga & St. Louis Ry., can the lines operating through Chattanooga, in accepting lower rates to Nashville, take into consideration the fact that the L. & N. R. R. Co. reduced its proportion of the Eastern rates to Nashville merely to enable Nashville to meet the competition of Evansville and Louisville, whose Eastern rates are fixed by the Northern Trunk Lines?"

Or, can the L. & N. R. R. Co. justify the acceptance of exceptionally low rates to a city on its line, when it is not com-

pelled to do so by competition of other carriers at that city, and the sole motive for doing so is to enable that city to compete with other cities located upon other railroads?

As I understand the question, it was involved in the case of L. & N. R. R. Co. vs. Behlmer, 175 U. S., p. —, decided at the present term; and it is whether competition *between markets* can be taken into consideration by carriers in charging less to longer than to shorter distance points.

In the Behlmer case, the Commission and the majority of the Court of Appeals held, in effect, that competition between market and market cannot be considered by carriers as affecting the circumstances and conditions under which transportation is conducted.

But in the case of Texas & Pacific Ry. Co. vs. I. C. C., known as the "Import" case, Mr. Justice Shiras, speaking for this Court, said: "It could not readily be supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, *sources of trade and commerce already existing*, nor to overlook the property rights of those who had invested money in the railroads of the country, *nor to disregard the interests of the consumers, to furnish whom with merchandise is one of the principal objects of all systems of transportation.*"

162 U. S., p. 211.

Nashville is situated on the Cumberland River, which is navigable for nine months in the year by steamboats of as much as three hundred tons burden.

Trans., pp. 49, 409.

While the Commission found that the present Nashville rates are not forced upon the carriers by water competition yet it also found that before railroads were built there were through lines of boats to Nashville from Cincinnati and other cities (Trans., p. 49); and that the amount of such additions to the Trunk Line rates from New York to Cincinnati as are made by the Louisville & Nashville Railroad from Cincinnati to Nashville "was doubtless fixed originally with reference

to the water rates between those cities, and it may be that the possibilities of water carriage have some influence in maintaining the present figures."

Trans., p. 49.

It is manifest that, before railroads were built, Nashville's location on the Cumberland river enabled her to compete with Louisville and Evansville in the territory between the Cumberland and Ohio rivers.

Nashville was, at that time (to use the language of Mr. Justice Shiras), one of the "sources of trade and commerce" for supplying the people who resided in the territory between those rivers; and it was not the intention of Congress "to interfere with and interrupt, much less destroy" Nashville as one of such sources of trade and commerce.

Again: the people or consumers who reside in the territory between those rivers had the benefit of Nashville being one of their "sources of trade and commerce;" and it was not the intention of Congress to disregard the interests of those consumers.

But, if the Act to regulate commerce be so construed as to prohibit the Louisville & Nashville R. R. Co. from accepting such rates on Eastern traffic to Nashville as will enable her to compete in said territory with Louisville and Evansville, the effect of the act will certainly be to "interfere with," "interrupt," and "destroy" Nashville as one of the "sources of trade and commerce" for said territory; and to "disregard the interests of the consumers" in said territory.

The competition between Louisville, Evansville and Nashville in said territory is just as effective, as it would be if all three of them were located upon the same line of railroad.

It is the fact that those cities compete with each other in the same territory that renders it necessary that they shall have such relative rates as will enable each of them to continue to compete. The fact that all of them are served by the same railroad,

or the fact that they are served by different railroads, is wholly immaterial.

The Hudson River Railroad runs up the eastern shore of the Hudson River, from New York to Albany. The West Shore Railroad runs up the western shore of that river, from Jersey City to Albany.

According to the theory of the Commission, and the majority of the Court of Appeals, in the Behlmer case, each road may compete for traffic against other lines on its own side of the river; but neither of them can do anything to promote the traffic upon its own side of the river in competition with the traffic upon the other side of the river. In other words, New York railroads may compete with New York railroads, and Jersey City railroads may compete with Jersey City railroads; but New York railroads must not compete with Jersey City railroads.

Such refinements may be interesting, but they cannot properly find a place in the construction of a statute intended for the practical administration of the most important commercial interests of the country.

It is perfectly obvious that Jersey City must have substantially the same rates as New York to the West, or it will be impossible for Jersey City to compete with New York in the West.

It makes no difference whether the Hudson River Railroad and the West Shore Railroad be (as they once were) owned by different companies, or (as they now are) owned by the same company; in either case Jersey City must have substantially the same rates as New York if Jersey City is to continue to compete with New York.

The Illinois Central R. R. has a line from the Ohio river to New Orleans, but it does not reach Mobile; and the Mobile & Ohio R. R. has a line from the Ohio river to Mobile, but it does not reach New Orleans.

The Illinois Central R. R. is interested in developing the port of New Orleans, while the Mobile & Ohio R. R. is interested in developing the port of Mobile.

It is obvious that Mobile must have substantially the same rates as New Orleans from the West, or there can be no competition between those cities, and, therefore, the competition between them (though they are located upon different railroads) is just as effective as if they were both located on the same railroad.

As a matter of fact, the competition "between market and market" is nothing more than competition between the carriers by which those markets are respectively served.

Markets cannot compete except by means of their respective carriers.

The Commission, itself, admits that "the strife for trade between different markets seeking transportation for *like* commodities to the same localities is undoubtedly *one of the most potent commercial forces of our time.*

4 I. C. Rep., p. 149, left col. Trammell et al. vs. Clyde S. S. Co. et al.

It is judicially known to the Court that Boston, New York, Philadelphia, and Baltimore are competing markets in the East for traffic to and from the West.

For twenty years or more the rates from Boston to Western competitive points have been the same as from New York. From Philadelphia and Baltimore the rates are "agreed differentials"—less than New York—the Baltimore rates being also lower than Philadelphia rates. When the rates from New York to Western points are changed, like changes have to be made from Boston, Philadelphia, and Baltimore; the "differentials" as between the Eastern cities being at all times maintained.

Wholesale Prices, Wages, and Transportation, Senate Rep. No. 1394, 2d Sess., 52d Con. Part 1, pp. 429, 430.

The Commission has recently considered the matter of said differentials on grain, etc., and refused to disturb them.

7 I. C. Rep., p. 613, N. Y. Produce Exchange vs. B. & O. R. R.

It is obvious that Boston, New York, Philadelphia, and Baltimore must have such relative rates to and from the West as will enable them to compete with each other or one or more of them must cease to compete. And it is equally obvious that the necessity for such relative rates is just as great, though the lines serving those cities are owned by different companies, as it would be if all of said lines were owned by one company.

It may be said that if substantial equality of rates be necessary to enable one city to compete with another in common territory, Chattanooga must have substantially the same rates as Nashville to enable Chattanooga to compete in the territory which lies between those cities.

The proposition is self-evident, and is not controverted by me.

The lines which make the rates from the East to Chattanooga have the perfect right to accept such rates as will enable Chattanooga to compete with Nashville in said territory on equal terms, but they are neither legally nor morally bound to exercise the right; especially as it would either give Chattanooga a monopoly of the territory in which the twenty-four Southern cities with which she is grouped are located, or it would necessitate similar reductions to all of those cities, and thus cause a greater loss of revenue than said lines ought to be required to bear.

The lines which make the rates from the East to Chattanooga do not make the rates from the East to Nashville; and the lines which make the rates from the East to Nashville do not make the rates from the East to Chattanooga.

The Chattanooga lines are therefore not to blame for the inequality which exists between the Chattanooga rates and the Nashville rates; and while they have the legal right to remove the inequality the law will not compel them to do so, to their own great detriment.

Chicago ——— N. Y. Central R. R. ——— New York

St. Louis ——— B. & O. R. R. ——— Baltimore

If the New York Central Railroad should put in a line of

rates between Chicago and New York so low as to draw to its road almost the entire volume of the East and West traffic, the Baltimore & Ohio Railroad would have the right to put in a competitive line of rates between St. Louis and Baltimore so as to prevent the New York Central Railroad from securing a monopoly of the East and West traffic; but there is nothing in the Act to Regulate Commerce *which requires the B. & O. R. R. Co. to do so.* It could abandon the competitive traffic to its rival, if it found that it was to its interest to do so.

As said by Mr. Justice Brewer: "Either company may reduce its rates as far as it pleases below what is a reasonable and fair compensation for the service without violating the Act, *and such reduction compels no change by its competitor or any other company.*"

10 U. S. App., 434, Chicago, etc., Ry. Co. vs. Osborne.

Respectfully submitted,

ED. BAXTER,

Of Counsel for Appellants.

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for Appellee.

Filed Feb. 23, 1900.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 481.

THE EAST TENNESSEE, VIRGINIA and GEORGIA RAILWAY COMPANY et al., appellants,
v.
THE INTERSTATE COMMERCE COMMISSION, appellee.

Appeal from the United States circuit court of appeals for the sixth circuit.

ARGUMENT IN BEHALF OF THE APPELLEE, THE INTERSTATE COMMERCE COMMISSION.

JAMES E. BOYD,
Assistant Attorney-General, and
L. A. SHAVER,
For Appellee.

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CHAPTER I.

STATEMENT OF CASE AND PLEADINGS.

This case originated from a complaint of the Board of Trade of Chattanooga, Tenn., against the defendant carriers, made to the Interstate Commerce Commission under section 13 of the act to regulate commerce.

This complaint contained *three* distinct charges or allegations of violations of the act to regulate commerce:

1. That the through rates of the defendants on traffic from the eastern seaboard cities, Baltimore, Philadelphia, New York, and Boston, *to Chattanooga* were unjust and unreasonable in themselves, and therefore in violation of section 1 of the act to regulate commerce, which requires "all rate charges to be just and reasonable."

2. That Chattanooga, Nashville, and Memphis compete for business in the same territory, and that the rates of defendants from said eastern seaboard cities to *Chattanooga, Nashville, and Memphis* gave an undue preference and advantage to Nashville and Memphis over Chattanooga, in violation of section 3 of the act,

which prohibits the making or giving any "undue preference or advantage to any locality *in any respect whatsoever*" and the subjecting "any locality to any undue prejudice or disadvantage *in any respect whatsoever*."

3. That the rates of the defendants from said eastern seaboard cities to Chattanooga are higher for the shorter haul to Chattanooga than for the longer haul through Chattanooga 151 miles on to Nashville and 310 miles on to Memphis, and that this is in violation of the "long and short haul" rule of section 4 of the act, which forbids the exaction, under substantially similar circumstances and conditions, of a greater charge for the shorter than the longer haul over the same line in the same direction, the shorter being included within the longer haul.

After due notice of these charges had been served upon the defendants and they had filed answers thereto, and after testimony taken and argument had in behalf of all parties in interest, the Commission ordered or notified the defendants "to cease and desist from making, enforcing, or receiving any higher rates for the transportation of traffic from eastern seaboard cities to Chattanooga than are accepted by them at the same time for like transportation to Nashville."

The Commission did not in its order expressly require that the rates to Chattanooga should not be higher than the rates to Memphis, because, as it states in its opinion, the Memphis rates being higher than the Nashville rates,

the making of the Chattanooga rates not higher than the Nashville rates would result in making the Chattanooga rates less than the Memphis rates, and therefore a compliance with the order of the Commission as to the rates to Chattanooga and Nashville would operate a readjustment of the rates as between Chattanooga and Memphis.

(See Record, p. 51.)

The order of the Commission, therefore, merely required that the rates to Chattanooga should not be higher than the rates to Nashville.

The defendants refused or neglected to obey the order of the Commission, and thereupon the Commission instituted the present proceeding in equity, under section 16 of the "Act to regulate commerce," in the circuit court of the United States for the eastern district of Tennessee.

A large amount of additional testimony was taken in the circuit court, and that court found that the order of the Commission was a lawful order, and decreed its enforcement. The defendants thereupon appealed to the circuit court of appeals for the sixth circuit, at Cincinnati, and that court affirmed the decree of the circuit court enforcing the order of the Commission. From that decree the case is now brought to this court on appeal.

The order of the Commission has thus, after due and thorough investigation, received the sanction of three tribunals—*first*, that of the Interstate Commerce Commission, a board or tribunal constituted by law for the investigation and determination of such questions, having long experience therein and being given by the law exceptional means and facilities for acquiring accurate knowledge in reference thereto; *second*, that of the United States circuit court for the eastern district of Tennessee (Judge Severens presiding), and *third*, that of the circuit court of appeals for the sixth circuit, composed of Mr. Justice Harlan and Circuit Judges Taft and Lurton, *whose decision was unanimous.*

ISSUES PRESENTED BY THE PLEADINGS IN COURT.

As before stated, the complaint filed before the Interstate Commerce Commission by the Board of Trade of Chattanooga charged the defendants with violations of sections *1*, *3*, *and 4* of the law. The petition or bill of complaint filed by the Commission in court embodies and has attached as an exhibit a copy of the complaint before the Commission and alleges that "it had been made to appear to the satisfaction of the Commission that the defendants had violated the provisions of the act to regulate commerce," as stated in the complaint before the Commission of the Board of Trade of Chattanooga. (Record, p. 6.)

The defendants in their answers filed in court deny that their rates are in violation of law as alleged.

The questions, then, whether the defendants' rates involved in this case are in violation of either sections 1, 3, and 4 of the law are distinctly in issue before the court.

The testimony before the Commission and that taken in the case before the court relate to these three issues.

CHAPTER II.

CHARGES THAT THE RATES OF DEFENDANTS ARE IN VIOLATION OF SECTIONS 3 AND 4 OF THE LAW.

COMPETITION PLEAD IN ANSWER TO THESE CHARGES.

ANSWERS TO PLEA OF COMPETITION.

We will first consider the last two charges, namely, that the rates of the defendants from the eastern seaboard to Chattanooga and Nashville are in violation of section 3 of the law in that they give an undue preference to Nashville over Chattanooga, and are in violation of section 4 of the law in that they are higher for the shorter haul to Chattanooga than for the longer haul through Chattanooga to Nashville.

In answer to these two charges the carriers interpose a defense in the nature of a plea of *confession and avoidance.* They admit or confess their discriminations against Chattanooga, but allege that, enormous as they are, those discriminations are not unjust, because, they say, they are compelled to make them by the greater force of competition in transportation from the eastern seaboard at Nashville than at Chattanooga.

ANSWERS TO PLEA OF COMPETITION.

In answer to this plea of competition, the main propositions for which we contend in behalf of the Commission are:

First. That as matter of fact the force of competition on transportation from the eastern seaboard to Nashville is not controlling or such as affects rates at Nashville to the extent of requiring them to be lower than rates to Chattanooga.

Second. That the factors or elements of competition in transportation from the eastern seaboard cities to Chattanooga are many times greater than on such transportation to Nashville, and that, therefore, under *normal* conditions the competition should be greater at Chattanooga than at Nashville.

Third. That the rates to Chattanooga by all routes from the eastern seaboard have been for a long period of time and are now established by *agreement* between the carriers as members of associations of southern railway and steamship companies; that this agreement fixing the rates *has restrained or stifled normal* competition at Chattanooga and prevented the reduction of the Chattanooga rates, and that a dissimilarity of conditions thus brought about by the agreement of the carriers can not justify discriminations.

Fourth. That even where some discrimination is justifiable because of the greater force of competition at the locality in favor of which the discrimination is made, the discrimination actually practiced may be excessive, and in this case it is *excessive.*

Fifth. That the injury or prejudice to Chattanooga, shown by the proof to be the effect of the discriminations practiced against Chattanooga and in favor of

Nashville, *brings the case within the evil which the act to regulate commerce was designed to remedy, and that competition, no matter how forceful, should not be held to nullify the law itself—in other words, should not be held to justify the very wrongs which the law was enacted to remedy.*

Sixth. That, inasmuch as the order of the Commission is simply that the carriers desist from charging higher rates to Chattanooga than to Nashville, it may be complied with (if the carriers so elect) by giving Chattanooga rates as high as those to Nashville, thus ignoring the natural advantage of the former in being the shorter-distance point, and this will be a reasonable allowance for any possible dissimilarity of condition resulting from the competition at Nashville shown in this case.

CHAPTER III.

THE PLEA OF COMPETITION.

CASES IN WHICH AND EXTENT TO WHICH COMPETITION MAY JUSTIFY EXEMPTION FROM THE RESTRAINTS OF SECTIONS 3 AND 4 OF THE LAW.

At the outset it is material to inquire in what cases and to what extent this court has held competition may justify discrimination.

Section 4 of the interstate-commerce law forbids the greater charge for the shorter than the longer haul only when the circumstances and conditions attending the transportation are "*substantially similar.*" *Section 3* forbids preferences between localities when they are undue or unreasonable, and this court holds that they are undue or unreasonable when the transportation is conducted under "*substatially similar circumstances and conditions.*"

The question, then, in this case, under sections 3 and 4, is whether the circumstances and conditions relating to the transportation from the Eastern seaboard to Chattanooga and Nashville, respectively, are "*substantially*

similar." If they are substantially similar, then the discriminations against Chattanooga are unjust and unlawful.

In the "Alabama Midland Case" (168 U. S., p. 164), it is true this court held that competition is "one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed substantially dissimilar," and that competition may, therefore, justify preferences under section 3 of the law, and the greater charge for the shorter than the longer haul under section 4.

The court then, however, takes particular pains to qualify or limit this proposition as follows:

"In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that *the mere fact of competition*, no matter what its character or *extent*, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the question of 'undue or unreasonable preference or advantage,' or what are 'substantially similar circumstances and conditions.' The competition *may* in some cases be such as, having due regard to the *interests of the public and of the carrier*, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration." (168 U. S., 167.)

"The mere fact of competition" does not, therefore, under this decision take a case from under the law as

laid down in the third and fourth sections, but only relieves the carrier from the restraints of those sections when the competition is of such "character and extent that the interests of the public," as well as of the carrier, demand such relief; and the court further holds that, whether the competition is of such character and extent that the interests of the public and the carrier justify exemptions from the restraints of the third and fourth sections, is a question of fact to be determined by the testimony in each case and not a question of law.

The above extract from the opinion of this court in the "Alabama Midland Case" is quoted and the propositions therein reaffirmed by this court in *Louisville and Nashville Railroad Co. et al* v. *Behlmer*, decided at the present term, and which will hereafter be referred to as the "Behlmer Case." The following is the language of this court in that case:

"It follows that whilst the carrier may *take into consideration* the existence of competition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles: First, the absolute command of the statute that all rates shall be just and reasonable and that no undue discrimination be brought about, though, in the nature of things, this latter consideration may, in many cases, be involved in the determination of whether competition was such as created a substantial dissimilarity of condition; second, that the competition relied upon be *not artificial* or merely conjectural, but *material and substantial*, thereby operating on the question of traffic and rate making, *the right in every event to be only enjoyed*

with a due regard to the interest of the public, after giving full weight to the benefits to be conferred on the place from whence the traffic moved as well as those to be derived by the locality to which it is to be delivered." (Pamph., p. 15.)

Judge Severens, in the opinion of the circuit court, delivered by him in the present case, in discussing the "Alabama Midland Case," says:

"In the case of the Interstate Commerce Commission *v.* The Alabama Midland Railway Company (168 U. S., 144) the Supreme Court, while reaffirming the doctrine that competition between railway carriers might and frequently ought to be considered in adjusting rates under the long and short haul clause, *yet took pains to prevent the inference from its opinion that it should be regarded as a controlling consideraton.*" * * *

"Congress must have intended something unusual and peculiar, out of the ordinary course of business, as that which would create a substantial dissimilarity; otherwise the vast bulk of transportation would not be subject to the rule at all." (Record, p. 374.)

That Congress did not intend that competition should in all cases justify the greater charge for the shorter haul under section 4 appears from the fact testified to by all the witnesses, both for the complainant and for the defendants, that, at the time the act to regulate commerce was passed and prior thereto and since, the greater charge for the shorter than the longer haul over the same line in the same direction, the shorter being included in the longer, only existed in cases of *competition in transportation* to the longer distance point.

(Answer of Jesse M. Smith to interrogatory 9, Record, p. 229; answer of Y. Van Den Burg to cross-questions 88–91, Record, pp. 140, 141; answers of T. S. Davant to cross-questions 17–20, Record, p. 155; answers of J. M. Culp to cross-question 42, Record, p. 168; answer of Joseph M. Brown to cross-questions 20, 21, Record, p. 187; answer of R. E. Lutz to cross-question 17, Record, p. 191; answer of W. A. Winburn to cross questions 17, 18, Record, p. 195; answer of George P. Biles to cross-questions 20, 20½, Record, p. 216).

It is to be presumed that Congress knew this fact, and having this knowledge, that it did not intend that competition in transportation should be an excuse in all cases, but only in certain extreme cases, where, in the language of the Supreme Court, the interests of the public as well as of the carrier demand it.

To hold otherwise would be placing Congress in the absurd position of laying down a rule and then providing that the rule should not be enforced in the only cases in which violations of the rule were known to exist—in other words, enacting a law and providing at the same time that it should be of no effect.

COMPETITION WHICH AFFECTS RATES NOT CONCLUSIVE.

Counsel for the carriers admits that the "*mere fact of competition*" is not sufficient, but he strenuously contends that under the decision of the Supreme Court in the "Alabama Midland Case," competition which "*affects rates*" is a conclusive ground of exemption from the restraints of sections 3 and 4 of the law.

The Supreme Court, however, does not hold that competition which "affects rates" is *ipso facto* a conclusive defense, and such a construction of its opinion does violence to the language of the court.

The language of the Supreme Court in the "Alabama Midland Case" is that "competition which affects rates is *one* of the matters to be *considered*" (168 U. S., 166); and again, that "competition between rival routes is *one* of the matters which *may* be lawfully *considered* in making rates, and a substantial dissimilarity of circumstances and conditions *may justify* common carriers in charging greater compensation for a shorter than a longer distance over the same line." (168 U. S., 170.)

To hold that a matter may be "*considered*" in the determination of a question is an altogether different thing from holding that it shall conclusively settle that question. To hold that a matter "*may justify*" is a wholly different thing from holding that it *does justify*.

The language of this court, that "competition which affects rates is *one* of the matters to be considered," necessarily implies that there are others.

OTHER MATTERS TO BE CONSIDERED.

Among other matters to be considered are the questions:

(1) Whether the discrimination practiced is not greater than is warranted by the dissimilarity of con-

ditions resulting from competition; in other words, whether the discrimination practiced is not *excessive*.

(2) Why the force of competition at the locality favored by the discrimination is more controlling than at the locality discriminated against—whether this is the result of the *normal* action of the competitive forces at the two localities, or has been brought about by concert or *agreement* between the carriers.

(3) Whether the "*interests of the public*," as well as of the carrier, will be subserved by the discrimination.

INTERESTS OF THE PUBLIC.

The words "interests of the public," as used by this court in the "Alabama Midland Case" and in the "Behlmer Case," of course refer to *legitimate* interests of all portions of the public affected, and not to interests of certain localities created and fostered by favoritism in rates.

It may be that the interests of Nashville, built up by discrimination against Chattanooga, would be injuriously affected by doing away with the existing preferences in rates in favor of that locality and against Chattanooga; but this is not a *legitimate* interest which the law was designed to protect. *It is, on the contrary, a wrong the law was enacted to remedy.*

This court has held, in the case of The Texas and Pacific Railway Company *vs.* The Interstate Commerce Commission (162 U. S., 233), known as the "Import

Case," and in the "Behlmer Case," that consideration must be had of the interests of the community at the locality from which the goods are shipped and the interests of the community at the locality to which the goods are shipped, as well as the interests of the carrier.

We contend—

(1) That no *lawful* interest of Nashville or the carriers will be affected by establishing a just relation between the rates to Nashville and Chattanooga.

(2) That the loss to the shipping points, Baltimore, Philadelphia, New York, and Boston, in trade to Nashville, if any, will be compensated or more than compensated by the increase in trade to Chattanooga.

(3) And that no ultimate loss in revenue to the carriers will result from a reduction of Chattanooga rates, because the tonnage of traffic hauled to Chattanooga will be increased.

It is beyond question that the rightful interests of Chattanooga will be promoted.

CHAPTER IV.

FIRST PROPOSITION.

THE COMPETITION AT NASHVILLE NOT SUFFICIENT, AS MATTER OF FACT, TO JUSTIFY DISCRIMINATION AGAINST CHATTANOOGA.

The first proposition for which we contend in answer to the plea of competition is—

That, as matter of fact, the force of competition on transportation from the eastern seaboard to Nashville is not controlling, or such as affects rates at Nashville to the extent of requiring those rates to be made lower than rates to Chattanooga.

1. We remark, in the first place, that if, as we contend in another branch of this argument, the evidence shows the rates from the eastern seaboard to Nashville are reasonably high, notwithstanding the alleged force of competition at Nashville, then the situation in legal contemplation has not been changed or affected by competition. The carriers could charge no more than reasonably high rates in the absence of competition.

The ground upon which it is claimed that competition justifies lower rates for the longer than the shorter haul

is that it has forced the carriers to charge for the longer haul rates lower than they might otherwise reasonably demand. Competition, therefore, which has left the carriers free to charge reasonably high rates for the longer haul, *which the law itself exacts*, is not such competition as can be plead in justification of discriminations.

LINES INVOLVED IN THIS CASE.

2. The lines involved in this case are from the Eastern seaboard cities—Baltimore, Philadelphia, New York, and Boston—either *all rail* through the country via Hagerstown, Md., or Alexandria, Va., and thence *through Chattanooga* to Nashville, or the *part water and part rail lines* from the Eastern seaboard by steamship to Norfolk, to Charleston, to Savannah, or to Brunswick, and thence by rail *through Chattanooga* to Nashville.

LINE VIA CHATTANOOGA, THE SHORT LINE TO NASHVILLE.

All these lines, whether all rail or rail and water, pass through Chattanooga to Nashville, the haul from Chattanooga to Nashville being over one road alone, the Nashville, Chattanooga and St. Louis. These lines are *the short lines* from the Eastern seaboard, both to Chattanooga and Nashville, and the haul from Chattanooga to Nashville is 151 miles longer than to Chattanooga.

THE "VAST MAJORITY" OF NASHVILLE TRAFFIC FROM THE EAST GOES THROUGH CHATTANOOGA.

On the testimony before the commission, which was taken over ten years ago, the commission found that over 50 per cent, or, in other words, *over half*, of the traffic from the Eastern seaboard to Nashville passed over the lines *through Chattanooga* to Nashville. The circuit court of appeals quoted this finding from the commission, but the undisputed proof before the court is that "*the vast majority* of the traffic from the Eastern seaboard reaches Nashville via Chattanooga." The following is an extract from the testimony of Y. Vandenberg, traffic manager of the Louisville and Nashville Railroad Company, and a witness for the carriers, on this point:

"Q. 10. What proportion of the tonnage from New York and other Eastern cities to Nashville reaches that point via Cincinnati or other Ohio River points, and what proportion of it reaches Nashville *via Chattanooga?*

"A. I do not know that I can give an estimate of that, but *the vast majority of the traffic reaches Nashville via Chattanooga.*"

(Record, bot. p. 126.)

While the shortest line from the Eastern seaboard to Nashville is one of the lines through Chattanooga, and the rule is that *the short line fixes the rates of all other lines between the same termini*, and while "the *vast majority* of the Nashville traffic from the Eastern seaboard passes over the line through Chattanooga," yet it is claimed that the rates by this line are controlled

and fixed by the rates of the lines from the Eastern seaboard *via Cincinnati* to Nashville. *This is the only competition set up in this case.*

CHATTANOOGA AS WELL AS NASHVILLE HAS BENEFIT OF LOW TRUNK-LINE RATES FROM EAST TO CINCINNATI.

It is claimed that Nashville by this competing route has the benefit of low trunk-line rates from the Eastern seaboard to Cincinnati, and counsel for the carriers calls attention to the fact that on traffic transported via Cincinnati to Nashville the same rate is charged to Cincinnati that would be charged if the goods were destined for that city.

It is to be borne in mind, however, that there is also a route from the eastern seaboard via Cincinnati *to Chattanooga*, namely, by the same trunk lines to Cincinnati and thence by the Cincinnati, New Orleans, and Texas Pacific Railway to Chattanooga, and it is equally true that when traffic is transported by this route to Chattanooga the same trunk-line rate is charged to Cincinnati as when the goods are destined for that city.

Chattanooga, therefore, has the benefit of cheap rates by the trunk line from the eastern seaboard to Cincinnati to exactly the same extent as Nashville. The difference in rates as between Chattanooga and Nashville commences at Cincinnati and results from the much higher

rates charged by the Cincinnati, New Orleans and Texas Pacific Railway Company from Cincinnati to Chattanooga than are charged by the Louisville and Nashville Railroad Company from Cincinnati to Nashville. Those rates by the two roads are as follows:

	1	2	3	4	5	6
Cincinnati to Chattanooga	49	41	42	43	34	27
Cincinnati to Nashville	26	21	16	12	10	9

First-class rate per ton, Cincinnati to Chattanooga	$9.80
First-class rate per ton, Cincinnati to Nashville	5.20

The rates from Cincinnati to Chattanooga are, as shown above, about *double* the rates to Nashville on *classes 1 and 2*, and *from two to three times as high as the Nashville rates on the remaining classes.*

The distance from Cincinnati to Chattanooga by the Cincinnati, New Orleans and Texas Pacific Railway is 335 miles, and from Cincinnati to Nashville by the Louisville and Nashville Railroad 295 miles, the former distance being 40 miles in excess of the latter. It is not claimed that this difference in the length of hauls authorizes or accounts for the difference in rates as between Chattanooga and Nashville.

ONLY COMPETITION RELIED ON THAT OF RIVERS FROM CINCINNATI TO NASHVILLE.

The sole contention on the part of the carriers is that the rates of the Louisville and Nashville Railroad

from Cincinnati to Nashville are affected by river transportation from Cincinnati to Nashville, namely, by the Ohio River from Cincinnati to Evansville, and thence by the Ohio and Cumberland rivers to Nashville.

It is urged that this river competition has reduced the rates of the Louisville and Nashville Railroad from Cincinnati to Nashville and that the lines involved in this case from the Eastern seaboard through Chattanooga to Nashville are compelled to meet these rates thus reduced, and that this necessitates or justifies the materially lower rates to Nashville than to Chattanooga.

Reduced to its final analysis, then, the only contention on the part of the carriers is that *river competition* by the Ohio and Cumberland rivers necessitates or justifies the lower rates to Nashville than to Chattanooga.

RIVER LINE DOES NOT AND CAN NOT CONTROL RATES OF RAIL LINE FROM CINCINNATI TO NASHVILLE.

ADVANTAGES OF RAIL ROUTE OVER RIVER ROUTE FROM CINCINNATI TO NASHVILLE.

That the river route via the Ohio and Cumberland rivers from Cincinnati to Nashville can not successfully compete with the rail route via the Louisville and Nashville road, when the rates of the latter are anywhere within the bounds of reason, appears from many facts disclosed by the testimony.

(1) DISTANCE AND TIME.—In the first place, the distance by the Ohio and Cumberland rivers from Cincinnati via Evansville to Nashville is 690 miles (T. M. Gallagher), while the distance by rail (Louisville and Nashville Railroad) is only 296 miles, and the time consumed by rail is only a few hours, while by river it is about two and one-half days from Evansville alone to Nashville, and a week for the round trip, and from Cincinnati to Nashville *six* days, or *twelve* days for round trip. (T. M. Gallagher.)

(2) TRANSFERS.—Eastern seaboard traffic destined to Nashville via Cincinnati and thence by river has to be transferred from the cars at Cincinnati to the Ohio River steamer, transferred again from the Ohio River steamer to the Cumberland River steamer at Evansville. If carried to Evansville by rail, it has to be transferred there from cars to steamer. These transfers, of course, involve delay and expense.

(3) NAVIGABILITY.—The Cumberland River is shown to be navigable by "very light-draft" steamers between Evansville and Nashville only *about* 7½ months a year, and from Paducah to Nashville only 8 to 8½ months a year, *in about six years out of seven.* In about one year out of seven, it is stated, the river is navigable about nine months in the year. This appears from the following testimony of T. M. Gallagher, general passenger and freight agent of the Cumberland River

line of steamers, examined as a witness in behalf of the defendants:

Question 10. (Direct examination.) "During how many months in the year, on an average, is the Cumberland River navigable for the steamboats which ply between Nashville and Paducah and between Nashville and Evansville?"

Answer. "Well, sir, the seasons differ. Sometimes we make fully 8 months to 8½ months between Nashville and Paducah and from 7½ to Evansville. Some seasons we run as long as 9 and 10 months. The weather seems to come around in cycles, and sometimes we hardly haul up the whole season." (Record, p. 172.)

The witness was cross-examined with a view of ascertaining how often the Cumberland River was navigable for 9 and 10 months in the year, as follows:

Cross-question 14. "You state that the Cumberland River was sometimes navigable 9 and 10 months in the year?"

Answer. "Yes, sir."

Cross-question 15. "About how often does that happen?"

Answer. "Well, it comes about every 7 years, we figure it"

Cross-question 16. "During the other years how long is it navigable?"

Answer. "We have 8 months' navigation and 8½ months to Paducah. Business drops out in the Evansville trade along about this time of the year (July 14). However, our boat is running now (July 14) to Evansville. It left to-day at noon (July 14). It is running a little longer than usual."

Cross-question 17. "During the other years how many months is the river navigable from Nashville to Paducah?"

Answer. "It runs about 8 months." (Record, p. 177.)

(4) NO THROUGH RATES AND SHIPMENTS BY CUMBERLAND RIVER.—There are no through rates or shipments from Eastern seaboard cities to Nashville via Cincinnati or via Evansville and thence over the Ohio and Cumberland rivers.

The following is an extract from the testimony of Y. Van Den Burg on this point:

Cross-question 50. "Have you, of your own personal knowledge, ever known of a *through shipment* from New York to Evansville by rail and thence by the Ohio and Cumberland rivers to Nashville?"
Answer. "No, sir." (Record, p. 137.)

On this point T. M. Gallagher, general freight and passenger agent of the River Line, testified as follows on cross-examination:

Cross-question 25. "Are there any *through rates* published from New York and other Eastern cities via Cincinnati and thence via the Ohio and Cumberland rivers to Nashville?"
Answer. "Not that I know of."
Cross-question 26. "Have you ever known of such through rates being published?"
Answer. "No, sir."

(5) NUMBER OF BOATS ON CUMBERLAND RIVER—WEEKLY TRIPS.—The witness, T. M. Gallagher, stated on direct examination that there were two lines of steamers on the Cumberland River, owning 5 boats. On cross-examination he testified that these two lines, the Paducah and Evansville lines, were under one

and the same ownership, and that *only one steamer plied between Nashville and Paducah and only one between Evansville and Nashville*, and that the steamer from Paducah to Nashville made two trips a week and the steamer from Evansville to Nashville only one trip a week. The following is his testimony on this point on cross-examination:

Cross-question 5. "One steamer plies, I understand you to say, between Nashville and Paducah?"
Answer. "Yes, sir."
Cross-question 6. "And makes two trips a week?"
Answer. "Two trips a week."
Cross-question 7. "Two round trips?"
Answer. "Two round trips."
Cross-question 8. "And one plies between Evansville and Nashville?"
Answer. "Yes, sir."
Cross-question 9. "And makes one trip a week?"
Answer. "Yes, sir."
Cross-question 10. "One round trip?"
Answer. "Yes, sir."
Cross-question 11. "Those are the only two boats that ply between Nashville and Paducah and Nashvile and Evansville?"
Answer. "Yes, sir."
(Record, p. 176.)

While the steamboat between Paducah and Nashville makes only two round trips a week and the steamboat from Evansville to Nashville makes only one round trip a week, the *rail lines have many trains daily, each of a tonnage capacity equal to or greater than that of the steamers on the Cumberland.*

(5) ADVANTAGES OF RAILROADS.—The all-rail lines from New York and other Eastern cities *via* Cincinnati to Nashville have the advantage over the part-rail and part-water line:

First. In that their traffic is hauled through from New York to Nashville *in carloads and in the same cars in which they are loaded at New York* and such other Eastern cities *without transfer or breakage of bulk. There is no charge for transfers, lighterage, or wharfage by the all-rail lines.*

Second. In the saving of TIME, which is an element of great importance in commercial transactions.

Third. In the matter of RISK. River transportation is notoriously more hazardous than transportation by rail. Goods transported by rivers are INSURED, while by all rail they are not.

(Testimony of T. M. Gallagher.)

Fourth. Rivers are circuitous, while rail lines are direct, and hence rail lines have the advantage over river lines in the matter of distance.

Fifth. Rail lines have also an advantage over river lines, in that the former have a MONOPOLY over their own roadbeds and rails, while rivers and navigable

bodies of water are public highways, open to all ships and steamers. Rail lines are not, therefore, subject to competition to the same extent that river lines are.

In consequence of these and other advantages possessed by rail lines over river or water lines the business of the river lines on long through hauls between termini served by rail lines has become insignificant, if it has not entirely ceased. The witness T. M. Gallagher having been asked if this was not the case, could name but one exception, and that was a barge line handling grain on the Mississippi River from St. Louis to New Orleans. On this point his testimony is as follows on cross-examination:

Cross-question 53. "Since railways have come into existence has not the business of the river lines on through hauls almost entirely ceased?"

Answer. "Except to some places. From St. Louis to New Orleans they have competition there with the railroads. I do not think the railroads will ever be able to overcome that. That is a barge line out of St. Louis handling grain out of St. Louis." (Record, p. 180.)

He further testified as follows:

Cross-question 28. "Notwithstanding the very much higher rate by rail from Evansville and Cincinnati to Nashville than by water, the railroads do almost the entire through business, do they not?"

Answer. "Yes, sir."

Cross-question 29. "And for how many years has that been the case, or about how many years?"

Answer. "I think about 15 or 16 years."

Cross-question 30. "Notwithstanding the compara-

tively low rates which you charge, then, the railroads still do the business?"

Answer. "Yes, sir. The shippers seem to give them the preference." (Record, p. 178.)

In this connection the following extract from the opinion of Judge Severens in this case is in point:

"The delays, hazards, and uncertainties which attend the navigation of such rivers as the Cumberland River have induced shippers to greatly prefer and to rely upon transportation by rail, and the carriage of freight by the navigation of such streams has been almost entirely discontinued in recent years." (Record, p. 372.)

NASHVILLE COAL RATE CASE. WITNESSES FOR CARRIERS IN THAT CASE TESTIFY THAT RIVER LINE TO NASHVILLE CAN NOT COMPETE WITH RAIL LINE.

The Nashville coal rate case involved rates on coal from the western Kentucky coal mines to Nashville and Memphis, respectively. The Louisville and Nashville road charged as high a rate on coal for 105 miles haul to Nashville as for to 265 miles haul to Memphis. In justification of this discrimination, the Louisville and Nashville road set up competition over the Ohio and Mississippi rivers in the transportation of coal from Pittsburg to Memphis.

Not only was competition by the Cumberland River ignored in the "Nashville Coal Rate Case," but proof was introduced by counsel for the Louisville and Nashville road (Mr. Baxter) showing that such competition

was impracticable, as appears from the following testimony (stipulated into this case) of John B. Atkinson, a witness for the road in that case:

Question 7. "Does any considerable quantity of coal now come to Nashville by river, and if not, why not?"

Answer. "I think no coal comes to Nashville by river at this time. *The expense of river transportation, with its attendant losses, drove the river coal from the market, not being able to compete with the railroad coal.*" (Record, p. 366.)

If river transportation can ever compete successfully with rail transportation, it is in the carriage of weighty and bulky traffic, of comparatively small value per weight, which can be hauled in light-draft barges, such as coal, grain, etc.

RAIL RATES THREE TIMES AS HIGH AS RIVER RATES, AND YET THE RAIL LINES GET THE BUSINESS.

Conclusive proof that the river line from Cincinnati to Nashville does not control or materially affect the rates by the rail line is furnished by the fact that the rail rates are three times as high as the rates by the river line, and yet the railroads get the traffic.

If transportation by the river line had any material influence on the rail rate, it is evident it would reduce the rail rate to the river rate or cause it to approximate the river rate.

T. M. Gallagher testified as follows on cross-examination:

Cross-question 21. "You have stated that the rates which your steamer lines were willing to accept from Evansville to Nashville were very much lower than the rates charged by the railroads?"

Answer. "Yes, sir."

Cross-question 22. "Are the rates which you charge from Paducah and Evansville very much lower than the rail rates from those points to Nashville?"

Answer. "I think they are."

Cross-question 23. "I think you said your highest rate was 10 cents per hundred pounds and your lowest 6?"

Answer. "Yes, sir. *The highest we have received on any shipping freight coming from Evansville brought to us by the railroads there in connection with our boats was 10 cents a hundred, and we have brought it as low as 6 cents a hundred.*"

Cross-question 28. "*Notwithstanding the very much higher rate by rail from Evansville and Cincinnati to Nashville than by water the railroads do almost the entire through business, do they not?*"

Answer. "*Yes, sir.*"

Cross-question 29. "And for how many years has that been the case, or about how many years?"

Answer. "I think about 15 or 16 years."

(Record, pp. 177, 178.)

RIVER RATES.—Highest river rate from Evansville to Nashville, 10 cents.

Lowest river rate from Evansville to Nashville, 6 cents.

Rail rates from Evansville to Nashville.

	Cents.
Class 1	38
Class 2	33
Class 3	28
Class 4	23

	Cents.
Class 5	18
Class 6	15

Average of river rates, 8 cents.

Average of rail rates, 26 cents.

Another significant fact, to which the circuit court of appeals forcibly alludes in its opinion in this case, is that the local rates of the Louisville and Nashville road from Cincinnati to Nashville are about twice as high as the rate which it charges on through shipments from the Eastern seaboard for its portion of the haul from Cincinnati to Nashville. These rates are shown in the table below:

	1.	2.	3.	4.	5.	6.
Local rate, Cincinnati to Nashville	53	46	39	31	25	25
Additions to trunk-line rate to Cincinnati	26	21	16	12	10	9

The local rates, then, charged by the Louisville and Nashville Railroad on local business originating at Cincinnati and terminating at Nashville is over three times as high as the average river rate, but nearly all the local business from Cincinnati to Nashville goes by rail.

We here quote as part of our argument what is said by the circuit court of appeals on this point, in its opinion in this case.

"Now, the local railway rates to Nashville from Ohio River points are about 50 per cent higher than the through

rates on New York shipments between the same points. To make the through New York rate to Nashville the same as that to Chattanooga, the Louisville and Nashville Company will not have to charge as much for its part of the carriage as its local rates. If the local rates have reduced river transportation to a minimum it is clear that any increase on through rates, under which they would still be less than local rates, can not affect river competition at all. In other words, *the margin of possible increase in the through rates, without affecting river competition, includes all the increase in rates required to comply with the order appealed from, even if the carriers elect to bring about the equality enjoined in the order by increasing the Nashville rate to the Chattanooga rate.* We may, therefore, eliminate Cumberland River competition as a factor in reaching our conclusion."

(Record, p. 411.)

CHAPTER V.

FIRST PROPOSITION CONTINUED.

RATES OF LOUISVILLE AND NASHVILLE RAILROAD FROM CINCINNATI TO NASHVILLE PROVEN TO BE NOT "UNREASONABLY LOW," NOTWITHSTANDING RIVER COMPETITION.

COMPETITION WHICH ONLY RESULTS IN REASONABLE RATES, WHICH THE LAW ITSELF EXACTS, NO JUSTIFICATION FOR DISCRIMINATION.

RIVER TRANSPORTATION CAN ONLY COMPETE WITH RAIL TRANSPORTATION WHEN RAIL RATES ARE EXCESSIVE.

Counsel for the carriers made proof, by T. S. Davant, that "the proportions which the Louisville and Nashville Railroad received from Cincinnati to Nashville on freight from New York *were about the same per ton per mile as the trunk-line rates from New York to Cincinnati*," and that neither the trunk-line rates from New York to Cincinnati nor the Louisville and Nashville rates from Cincinnati to Nashville were unreasonably low.

This proof is contained in the following extract from the testimony, on redirect examination by counsel for

the carriers, of T. S. Davant, general freight agent of the Norfolk and Western Railroad Company:

Question 1. "Are not the rates from New York to Nashville made by the trunk lines to Cincinnati and thence by the Louisville and Nashville Railroad to Nashville?"

Answer. "Yes, sir."

Question 2. "Do you regard the trunk-line rates from New York to Cincinnati as unreasonably low?"

Answer. "No, sir."

Question 3. "Are not the proportions which the Louisville and Nashville Railroad receives from Cincinnati to Nashville on freight from New York the same per ton per mile as the trunk-line rates from New York to Cincinnati?"

Answer. "I can not answer that question definitely, but it is my information that they are on that basis."

Question 4. "Then, if the trunk-line rates per ton per mile from New York to Cincinnati are not unreasonably low, do you think that the Louisville and Nashville proportions from Cincinnati to Nashville are unreasonably low?"

Answer. "No, sir."

(Record, p. 155.)

Rates which are not "unreasonably low" must be reasonably high. This proof, then, shows that the rates of the Louisville and Nashville road from Cincinnati to Nashville on Eastern seaboard traffic are reasonably high. *Therefore river competition by the Ohio and Cumberland rivers from Cincinnati, or from Evansville to Nashville, if it has had any effect on the rail rates of the Louisville and Nashville road between those cities, has only held them down to a legitimate or reasonably high*

basis, and has prevented that road from charging unreasonably high rates.

The only competition by the Cumberland River possible is that which would be brought into operation by excessive or *prohibitory* rail rates. *If the flow of commerce is diverted from its natural channel by excessive or prohibitory rates, it will, like water, seek outlet by any other available route.*

As said in the preceding chapter, carriers have no right to charge rates that are more than reasonably high. In the absence of this river competition, the law, if enforced, would have held the Louisville and Nashville road down to reasonably high rates. It may be safely affirmed that water competition, which results only in forcing carriers to charge reasonable rates, which the law itself exacts, is not such competition as can be plead in justification of discriminations.

The carriers could charge no more in the absence of such competition. The situation in legal contemplation, then, has not been changed or affected by competition.

Again, if the rate per ton per mile from Cincinnati to Nashville is the same as the trunk-line rate per ton per mile to Cincinnati, then it would appear highly improbable, to say the least, that the rate from Cincinnati is controlled by river competition.

WHEN THE RAIL RATES FROM CINCINNATI OR EVANSVILLE TO NASHVILLE ARE NOT EXCESSIVE, BUT ONLY REASONABLY HIGH, IT WOULD APPEAR, FROM THE FACTS TESTIFED TO BY WITNESSES FOR THE CARRIERS, SET FORTH IN THE PRECEDING CHAPTER, TO BE IMPOSSIBLE THAT RIVER TRANSPORTATION BY THE OHIO AND CUMBERLAND RIVERS BETWEEN THOSE POINTS COULD SUCCESSFULLY COMPETE WITH RAIL TRANSPORTATION.

CHAPTER VI.

SECOND PROPOSITION.

FACTORS OR ELEMENTS OF COMPETITION GREATER AT CHATTANOOGA THAN AT NASHVILLE.

Our second answer to the plea of competition is—

That the factors or elements of competition in transportation from the Eastern seaboard cities to Chattanooga are many times greater than on such transportation to Nashville, and that, therefore, under *normal* conditions the competition should be greater at Chattanooga than at Nashville.

A competitive point may be defined to be a point for the carriage of traffic to which two or more lines of transportation do or may compete. *Ordinarily it would appear that the greater the number of competing lines reaching a locality the greater would be the force competition to that locality.*

The case of the Interstate Commerce Commission *v.* The Alabama Midland Railway Company et al., known as the Alabama Midland Case, involved rates from the Eastern seaboard cities to Troy, Ala., as the shorter distance point, and for the haul through Troy to Montgomery, Ala., as the longer distance point, and all three courts—this court, the circuit court of appeals,

and the circuit court—emphasize in their opinions as material, if not controlling, as justifying the lower rates to Montgomery than to Troy, the fact that there were "many more lines of railway running to Montgomery than to Troy." (168 U. S., 171; 69 Fed. Rep., 327; 41 U. S. Appeals, 453.)

This court in its opinion, quoting from the decisions of the courts below, says:

"Only two railroads, the Alabama Midland and the Georgia Central, reach Troy. Each of these roads has connection with other lines, parties hereto, reaching all the long-distance markets mentioned in these proceedings. * * * *There are many more railroad lines running from and to Montgomery* connecting with all the distant markets."

The situation in this respect in the present case is exactly the reverse of that thus stated by this court to have been the situation in the Alabama Midland case. Only two roads having connection with lines to the eastern seaboard actually run into Nashville, the longer-distance point—the Louisville and Nashville and the Nashville, Chattanooga and St. Louis railways; while nine distinct roads or lines of railway having connection with lines to the eastern seaboard actually run into Chattanooga, the shorter-distance point.

These nine roads are as follows:

1. The Nashville, Chattanooga and St. Louis Railway, which runs from Chattanooga to Nashville, where it

connects with the Louisville and Nashville road and forms a line to eastern seaboard cities, either via Cincinnati on the north, or via Memphis and thence by water, or via New Orleans and thence by water, or via the South Atlantic ports—Brunswick, Charleston, Savannah, and Norfolk—to eastern seaboard cities, or via all-rail lines connecting with the Louisville and Nashville road.

2. The Memphis and Charleston road, which runs from Chattanooga to Decatur, where it connects with the Louisville and Nashville and forms lines in both directions, and thence on to Memphis, where it connects with the Mississippi River and forms a line thence via New Orleans.

3. The Alabama Great Southern road, which runs from Chattanooga to Birmingham, where it connects with roads running to New Orleans, forming a line thence by Gulf and ocean, and to Atlanta, forming numerous lines thence by the South Atlantic ports and thence by ocean, or from Atlanta by numerous all-rail lines through Bristol, Alexandria, and Norfolk.

4. The Chatanooga Southern Railway, from Chattanooga to Gadsden, where it connects with a number of other roads, and forms various lines, all rail or rail and water.

5. The Chattanooga, Rome and Columbus road, which runs from Chattanooga to Rome, where it connects with various rail lines running through Atlanta to the South Atlantic ports and on to Carrollton, where it connects with the Central of Georgia system and thence forms various lines, rail and water, via the South Atlantic ports or all rail.

6. The Southern Railway (south of Chattanooga), which runs from Chattanooga via Rome to Atlanta and there connects with the numerous lines, either all rail or rail and water, via the South Atlantic ports.

7. The Western and Atlantic Railroad from Chattanooga to Atlanta direct, where it connects and forms lines with the various lines, all rail or part rail and part water, via the South Atlantic ports.

8. The Southern Railway (east of Chattanooga), which runs from Chattanooga via Knoxville to Bristol, and thence forms lines, all rail through Hagerstown or Alexandria, or rail and water via Norfolk.

9. The Cincinnati, New Orleans and Texas Pacific Railway, which runs from Chattanooga to Cincinnati, where it connects with the trunk lines to the East.

LOUISVILLE AND NASHVILLE RAILROAD AND NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY UNDER THE SAME CONTROL AND OWNERSHIP.

Furthermore, it appears that those two roads which enter Nashville are practically under one control. It is agreed (Record, p. 258) between counsel for both sides in this case that the capital stock of the Nashville, Chattanooga and St. Louis Railway is represented by 100,000 shares of $100 each, aggregating $10,000,000; that a majority of these shares, to wit, 55,005, was purchased for the Louisville and Nashville Railroad Company, March 1, 1882, and that that company still has the legal title thereto, and for the fiscal year ending June 30, 1896, received as dividends on account of this stock $220,000; and that the affairs of the Nashville, Chattanooga and St. Louis Railway Company are managed by a board of directors consisting of 15 members, who are chosen by the stockholders from their own body, and that in all elections for directors each share of stock is entitled to one vote.

As the Louisville and Nashville Railroad Company owns a majority of the shares of stock of the Nashville,

Chattanooga and St. Louis Railway, and as each share is entitled to one vote, and the directors of the Nashville, Chattanooga and St. Louis Railway Company, who manage the affairs of said company, are elected by the stockholders, *the Louisville and Nashville Railroad Company can elect a majority or all of those directors, and thus manage or absolutely control the affairs of the company.*

It is true, it is stipulated that a number of the officials of that company would testify that the two companies are distinct in their management, and that they are actual and *bona fide* competitors for all traffic from Eastern seaboard cities destined to Nashville; *but it is manifest that the Louisville and Nashville, by its ownership of a majority of the stock of the other company and by its power in virtue of such ownership to select all the directors who manage the affairs of that company, can control the competition between the two companies and restrain it when it becomes injurious to the interests of the Louisville and Nashville Railroad Company.*

The question will naturally arise, *Why did the Louisville and Nashville Railroad Company acquire the legal title to a bare majority of the capital stock of the Nashville, Chattanooga and St. Louis Railway Company, except for the purpose of securing control of the affairs of that company with a view to the promotion of the interests of the Louisville and Nashville Railroad Company?*

THEY CERTAINLY DID NOT BUY THE STOCK SIMPLY AS AN INVESTMENT.

We give below as part of our argument what is said by the circuit court of appeals in its opinion in this case on this point:

"We know that it is stipulated in the record that the officers of the Nashville, Chattanooga and St. Louis Railway Company would testify that it competes with the Louisville and Nashville Railroad Company, and that they are under different managements; but *such evidence must be weighed in the light of the history of railroads in this country and the motives that ordinarily govern in railroad management. One railroad company acquires the controlling interest in another company to control its general policy*; and while it may permit independence in the personnel and the details of management, it needs more than a stipulated statement of this general nature to induce a belief that the company which elects the directors of the other will permit that other to take a course materially detrimental to the interests of the owning company."
(Record, pp. 414, 415.)

The nine roads entering Chattanooga constitute about five distinct systems, three of those roads being in the Southern Railway system, and the Nashville, Chattanooga and St. Louis Railroad being lessee of the Western and Atlantic. *There are five systems of railway entering Chattanooga, against one entering Nashville.*

On the transportation of traffic, therefore, from the Eastern seaboard via Cincinnati to Chattanooga, the

Cincinnati, New Orleans and Texas Pacific Railway meets at Chattanooga, or under normal conditions should meet, the competition of five systems of railway, whereas on such transportation from Cincinnati to Nashville the Louisville and Nashville roads *meet the competition of but one road alone, and that road is subject to its control. It virtually meets no competition at all.*

Witnesses for the roads have exhausted their ingenuity in forming lines from Eastern seaboard cities to Nashville and have encumbered the record with statements of those lines. For example, George R. Knox, general freight agent of the Nashville, Chattanooga and St. Louis Railway, was asked by counsel for the roads, on direct examination, the following question:

> Question 11. "Please state each route—whether rail, water, or rail and water—which actually competed in 1892 for the transportation of freight from New York and Boston, *via Chattanooga*, to Nashville."
> (Record, p. 198.)

It will be noted that the question relates only to routes "*via Chattanooga*" to Nashville, and the witness in answer names 40 different routes, covering 8 pages of the record, from page 198 to page 205. As all those routes are *via Chattanooga* to Nashville, they *must all come to Chattanooga* before reaching Nashville. *Therefore all these 40 routes, covering 8 pages of the record,*

are routes to Chattanooga as well as to Nashville, and these routes to Chattanooga are all 151 miles shorter than to Nashville.

It was not deemed necessary to encumber the record with the vast number of routes or lines, all rail or rail and water, which might be formed from the Eastern seaboard cities, Boston and New York, to Chattanooga by combinations with the nine roads whose rails enter Chattanooga. If forty combinations or routes can be formed from those cities via Chattanooga to Nashville with only *two* roads entering Nashville, it is difficult to compute the number of combinations or routes which might be formed with the *nine* roads entering Chattanooga. The number, it is manifest, would be much greater to Chattanooga than to Nashville, and would occupy a much larger space in the record.

We naturally conclude, therefore, that if the degree of competition depends upon the number of competing lines, the competition is many times greater to Chattanooga than to Nashville.

CHAPTER VII.

SECOND PROPOSITION CONTINUED.

COMPETITION CONTINUED—COMPETITION BY CUMBERLAND RIVER FROM EVANSVILLE TO NASHVILLE MORE THAN OFFSET BY OCEAN COMPETITION ON ROUTE VIA SAVANNAH AND CHARLESTON TO CHATTANOOGA—COMPETITION BY TENNESSEE RIVER.

We have shown in Chapters IV and V *supra* that competition by the Ohio and Cumberland rivers is of no controlling force as to traffic shipped from Eastern seaboard cities *via* Cincinnati to Nashville, and that *in the nature of things it can not "effect rates" on direct rail lines so long as those rates are reasonable and not excessive.*

If, however, competition by the Cumberland River was of controlling force, it is more than offset by the ocean competition from New York and other Eastern seaboard cities on the route from those cities via Charleston, Savannah, and other south Atlantic ports, to Chattanooga.

As said by Judge Severens:

"The rail portion of the route via Cincinnati to Nashville is very much greater than that of the route to Chatta-

nooga when the transportation is partly by rail and partly by water." (Record, p. 377.)

This is seen from the distances below:

	Miles.
Distance by short-rail line from Savannah to Chattanooga.	418
Distance by short-rail line from Charleston to Chattanooga.	447
Distance by short-rail line from New York to Cincinnati...	757
Distance by short-rail line from New York to Evansville...	1,019

It is a universally recognized fact that ocean transportation from New York and other Eastern cities to Charleston, Savannah, and other South Atlantic cities, is the great dominating or controlling factor in the making of rates on Eastern traffic to interior points, like Chattanooga, in all this Southern territory.

Chattanooga is 151 miles nearer this ocean competition than Nashville.

In this connection the following from the opinion of Judge Severens is *apropos:*

"*Chattanooga is so much better situated in its relation to the Eastern ports, if it is allowed the legitimate benefit of competition by water transportation,* that it is very difficult to find any just reason why the charges to that place should be so out of proportion to those at Nashville. *Chattanooga, too, has more railroads.* They might compete there if they would. They do not think it to their interest to do so. And thus it is that Chattanooga, *with a location nearer to the Eastern seaboard ports* and having many more railroads than Nashville, is yet denied the benefit of that advantage by reason of the

competition at Nashville of one railroad with the *navigation of the Cumberland River, an element of trifling importance when compared with the transportation by sea on the route to Chattanooga.* The natural advantages greatly favor the latter place." (Record, p. 377.)

COMPETITION BY TENNESSEE RIVER.

Competition by the Tennessee River to Chattanooga is *potential* the year round. (See testimony of Magill, Payne, Snow, Dobbs, Merriam, in answer to interrogatory No. 24, Record, pp. 243, 245, 247, 250, 253.)

R. E. Lutz, a witness for defendants, testifies that—

"There is water competition *via* the Ohio and *Tennessee* rivers" to Chattanooga, and "*not an impracticable* route for business from Cincinnati to Chattanooga is *via* the Ohio and Mississippi rivers to Memphis and thence *via* the Memphis and Charleston Railroad." (Record, p. 192.)

CHAPTER VIII.

SECOND PROPOSITION CONTINUED.

FACTORS OF COMPETITION AT CHATTANOOGA AND NASHVILLE, RESPECTIVELY, STATED IN PARALLEL COLUMNS.

AT CHATTANOOGA.	AT NASHVILLE.
1.	1.
Nine railroads, constituting *five* systems, enter Chattanooga and form parts of lines to Eastern seaboard cities.	*Two* railroads, practically *one system*, enter Nashville and form parts of lines to Eastern seaboard cities.
2.	2.
On route from Eastern seaboard cities *via Cincinnati* to Chattanooga, *low trunk-line rates to Cincinnati.*	On route from Eastern seaboard cities via Cincinnati to Nashville, *low-trunk line rates to Cincinnati.*
3.	3.
Cheap ocean transportation from Eastern seaboard cities to Charleston, Savannah, and other South Atlantic ports. *Rail portion* of the route to Chattanooga via Charleston and Savannah *much less than rail* portion of route via Cincinnati and Ohio and Cumberland rivers to Nashville.	Cumberland River, navigable by very *light-draft boats* about eight months in the year. River rates *less than one-third* of rail rates, but the traffic goes by rail. *Rail portion* of the route to Nashville via Cincinnati and the Ohio and Cumberland rivers *much greater* than rail portion of route to Chattanooga via Charleston and Savannah.

At Chattanooga—Cont'd.	At Nashville—Cont'd.
4.	
Distance by short rail line and by the lines via Charleston and Savannah from Eastern seaboard cities to Chattanooga, *151 miles less* than to Nashville. *Distance* by above lines to Chattanooga, *305 miles less* than by line via Cincinnati to Nashville.	
5.	
Low rail rates on rail lines in Eastern territory north of the Potomac.	
6.	
Tennessee River.	

Judge Severens thus forcibly sums up the relative competitive advantages of Chattanooga and Nashville:

"Chattanooga is so much better situated in its relation to the Eastern ports, if it is allowed the legitimate benefit of competition by water transportation, that it is very difficult to find any just reason why the charges to that place should be so out of proportion to those at Nashville. Chattanooga, too, has more railroads. *They might compete there if they would. They do not think it to their interest to do so. And thus it is that Chattanooga, with a location nearer to the Eastern seaboard ports, and having many more railroads than Nashville,* is yet denied the benefit of that advantage by reasons of the competition at Nashville of one railroad with the navigation of the Cumberland River, an element of trifling impor-

tance when compared with the transportation by sea on the route to Chattanooga. The natural advantages greatly favor the latter place. In my opinion, the faculty of rate making has here completely frustrated the law. *The scope of the statute is universal, and all the public in every part of the country is entitled to enjoy its benefits. Nor is it a piece of shreds and patches with large rents for great mischief to flourish in.*" (Record, p. 377).

The material fact is that the elements of competition are greater at Chattanooga than at Nashville. If competition does not in fact exist at Chattanooga to the same extent as, or a greater extent than, at Nashville, *this must be the result of concert or agreement between the carriers.* They can not be allowed to set up their own wrongful action in justification of discriminations against Chattanooga; in other words, they can not be allowed to "TAKE ADVANTAGE OF THEIR OWN WRONG."

As shown in the following chapter, the rates to Chattanooga are fixed by agreement between the carriers, and this agreement has stifled the NORMAL force of competition at Chattanooga.

CHAPTER IX.

THIRD PROPOSITION.

RATES TO CHATTANOOGA MADE BY AGREEMENT.

COMPETITION THUS STIFLED.

If, as we have shown, the factors of competition on transportation from the eastern seaboard to Chattanooga are greater than on such transportation to Nashville, the question arises, *why this competition at Chattanooga is not effective or controlling so as to make the Chattanooga rates at least as low as, if not relatively as well as absolutely, lower than the Nashville rates?*

This brings us to the consideration of our third proposition in answer to the plea of competition, namely:

That the rates to Chattanooga by all routes from the eastern seaboard have been for a long period of time and are now established by *agreement* between the carries as members of associations of Southern railway and steamship companies; that this agreement fixing the rates has restrained or stifled normal competition at Chattanooga and prevented the reduction of the Chattanooga rates, and that the dissimilarity of conditions thus brought about by the agreement of the carriers can not justify discrimination.

In the use of the words, "under substantially similar circumstances and conditions," the law has regard to

normal conditions and not to an artificial or abnormal situation brought about by agreement between the carriers.

In this connection we quote as part of our argument what is said on this subject by the circuit court of appeals in its opinion in this case:

"The evidence shows that the rates to Chattanooga from Cincinnati and from the eastern seaboard have always been fixed and agreed upon by an association of the Southern railway and steamship companies. * * * Without such an agreement it is not possible to see why *normal* competition would not give Chattanooga substantially the same rates as Nashville * * * It is not in accord with the spirit and letter of the law to recognize as a condition justifying discrimination against one locality competition against a more distant locality when competition at the nearer point is stifled or reduced, not by *normal* restrictions, but by agreement between those who otherwise would be competing carriers. The difference in conditions thus produced is affected by a restraint upon trade and commerce, which is not only violative of the common law but of the so-called antitrust act." (See opinion of circuit court of appeals.)

(Record, pp. 412–414.)

This court has held in the case known as the "Joint Traffic Case" (171 U. S., 505) that when carriers come together and agree upon the rates to be charged by them, *those rates will be higher than rates which are the result of active competition. This proposition is the basis of the decision of the court in that case.*

In that case, in speaking of the agreement in the Trans-Missouri Case (166 U. S., p. 209) and of the agreement in the Joint Traffic Association Case, this court says:

"The natural and direct effect of the two agreements is the same, viz, *to maintain rates at a higher level than would otherwise prevail.*" (171 U. S., 565.)

And again:

"The agreement" (Joint Traffic Association agreement) "*affects interstate commerce by destroying competition and by maintaining rates above what competition might produce.*" (171 U. S., 569.)

And again, the court speaks of the Joint Traffic Association agreement as one made—

"For the purpose of *stifling competition* among themselves" (the competing lines), "and of thus keeping their rates and charges higher *than they might otherwise be under the laws of competition.*" (171 U. S., 571.)

We thus have the sanction of this court for our proposition, that, where rates are fixed by agreement, they will be higher than rates which might be produced under the laws of competition, and it is equally true that a discrimination in rates thus brought about can not be justified under the law.

Chapter X.

FOURTH AND FIFTH PROPOSITIONS.

DISCRIMINATION SHOULD NOT BE IN EXCESS OF WHAT IS WARRANTED BY THE DISSIMILARITY OF CONDITIONS. DISCRIMINATION IN THIS CASE EXCESSIVE.

THE INJURY RESULTING FROM THE DISCRIMINATION IN THIS CASE FALLS WITHIN THE EVIL THE LAW WAS INTENDED TO REMEDY. COMPETITION SHOULD NOT BE HELD TO JUSTIFY THE WRONGS THE LAW WAS DESIGNED TO PREVENT.

TESTIMONY OF CHATTANOOGA MERCHANTS SHOWING INJURY RESULTING FROM THE DISCRIMINATION PRACTICED.

Our fourth and fifth propositions in answer to the plea of competition are germane and may be considered together. They are as follows:

Fourth. That even where some discrimination is justifiable because of the greater force of competition at the locality in favor of which the discrimination is made, the discrimination actually practiced may be in excess of what is warranted by the dissimilarity of conditions, and that in this case *the discrimination is excessive.*

Fifth. That the injury or prejudice to Chattanooga, shown by the proof to be the effect of the discrimination practiced against Chattanooga and in favor of Nashville, *brings the case within the evil which the act to regulate commerce was designed to remedy and that competition, no matter how forceful, should not be held to nullify the law itself—in other words, should not be held to justify the very wrong which the law was enacted to remedy.*

EXTENT OF THE DISCRIMINATION MUST NOT EXCEED WHAT IS WARRANTED BY THE DISSIMILARITY OF CONDITIONS.

It is manifest that although a substantial dissimilarity of condition resulting from competition may exist, the extent of the discrimination may be in excess of what is warranted by such dissimilarity of condition.

In his opinion in this case Judge Severens says on this point:

"The restraint of section 4 is to be applied upon the scale of comparison between dissimilarity of conditions and the disparity of rates, and it is competent under that section to restrain the exaction of the greater charge for the shorter haul, although there may be a substantial dissimilarity of conditions, *provided the dissimilarity is not so great as to justify the discrimination made.*" (Record, p. 379).

The language of section 3, "*undue or unreasonable* prejudice or disadvantage," necessarily calls for a measurement or consideration of the extent of the injury or prejudice resulting from the discrimination. The language *ex vi termini* imports or requires *measurement.*

WHEN UNDER INVESTIGATION, COURTS OR COMMISSION MUST DETERMINE THE MATTER.

It is equally manifest that the determination of the amount or extent of the discrimination which may be practiced is not to be left to the carrier *where the matter is under judicial investigation.*

If carriers are to determine the extent of the discrimination a dissimilarity of condition in a given case may justify, then, whenever such dissimilarity is shown, the case is taken from under the law, and neither courts nor commission have the power to interfere, and carriers are left at liberty to practice discrimination to any extent they please over and above the amount justified by the dissimilarity of condition.

In this connection the following extract from the opinion of Judge Severens is apropos:

"The argument of counsel for the carriers is in effect that the *extent* of the discrimination must be confided to the judgment of the railroad officials, whose ability and experience best qualify them for the task. If this be so, there is nothing for the Commission or the court to do but to take notice of the fact that the conditions are dissimilar, and abandon all further inquiry. *It is fundamental that no such proposition as this can be admitted.*"

(Record, pp. 377, 378.)

And again, Judge Severens says:

"It must happen that judges and juries who are called to decide such questions are much less familiar with the

details of the business and the requirements of railroad management than those who, from many years' experience, have become expert in such matters; *but there is a necessity that such questions be decided, and the courts and juries are delegated to decide them, however much of skill and experience may be involved in the controversy or the solution of it.*" (Record, p. 374).

In the opinion of the circuit court of appeals in this case it is said:

"It has been suggested that traffic managers are much better able, by reason of their knowledge and experience, to fix rates and to decide what discriminations are justified by the circumstances than the courts. This can not be conceded so far as it relates to the Interstate Commerce Commission, which, by reason of the experience of its members in this kind of controversy and their great opportunity for full information, is, in a sense, an expert tribunal; but it is true of the Federal court. *Nevertheless, courts are continually called upon to review the work of experts in all branches of business and science, and the intention of Congress that they should revise the work of railway traffic experts, whether railway managers or commerce commissioners, is too clear to admit of dispute.*" (Record, p. 415.)

In the "Alabama Midland case," counsel for the Commission contended before this court that in certain extracts from its opinion in that case the circuit court of appeals held in effect that "the determination of the extent to which discrimination is justified by circumstances and conditions should be left to the carriers." In answer to that contention of counsel for the Commission this court says:

"If so read, we should not be *ready to adopt or approve such a position.* But we understand the statement, read

in the connection in which it occurs, to mean only that, when once a substantial dissimilarity of circumstances and conditions has been made to appear, the carriers are, from the nature of the question, better fitted to adjust rates to suit such dissimilarity of circumstances and their conditions than courts or commissions; and when we consider the difficulty, the practical impossibility, of a court or a commission taking into view the various and continually changing facts that bear upon the question and intelligently regulating rates and charges accordingly, the observation objected to is manifestly just. *But it does not mean that the action of the carriers, in fixing and adjusting the rates in such instances, is not subject to revision by the Commission and the courts, when it is charged that such action has resulted in rates unjust or unreasonable, or in unjust discriminations and preferences.*" (168 U. S., p. 173.)

In the concluding clause of the proviso to the fourth section of the law the authority is expressly conferred upon the Commission to prescribe the *extent* of the discrimination which may be justified under that section, as follows:

"The Commission may from time to time prescribe the *extent* to which designated common carriers may be relieved from the operation of this" (fourth) "section of the act."

Carriers must, it is true, *in the first instance* determine the *extent* of the discrimination justified by a dissimilarity of conditions, *but when their action in this regard is under judicial investigation, their determination of the question can not be held to be conclusive.*

The maxim of the law is that no man shall be judge in his own case (*nemo debet esse judex in propria causa*).

The claim of counsel for the carriers is in effect that they should be exempt from this rule and be judges in their own cases. It might as well be said where a party is sued for a debt that he, being conversant with all the facts and circumstances relating to the alleged indebtedness, is therefore better qualified than any court or jury to determine whether there is any indebtedness, and if so, the amount of it.

HOW IT IS TO BE DETERMINED WHETHER THE DISCRIMINATION IN A GIVEN CASE IS EXCESSIVE. ONE TEST, THE EXTENT OF THE INJURY INFLICTED ON THE LOCALITY DISCRIMINATED AGAINST.

The question arises how are the courts (or the Commission) to determine whether the discrimination in a given case is or is not excessive. We think one of the tests is *the extent of the injury* resulting to the locality, or that portion of the public, discriminated against.

Discrimination is claimed to be justified only on the ground that it is necessary to enable the carrier making the discrimination to meet competition and thus retain competitive traffic. In determining the extent to which a carrier may thus go in protecting *its own interest* we should apply the maxim of the law, "*so use your own that you do not injure the interest of another*" (*sic utere tuo ut alienum non laedas*).

Under this maxim a private citizen may use his own private property for his personal benefit only to the

extent that he can do so without inflicting material injury on others.

A fortiori is this true with reference to a quasi-public corporation, like a common carrier, which derives, in the language of this court in the Goodrich case, its franchise or "its right to exist" from the public, and we here remark that, if there should be a conflict between the interests of the public and of the carrier, that of the public should be held to be paramount.

As we have heretofore shown, this court has held in the "Alabama Midland case," in the "Social Circle case," and in the recently decided "Behlmer case," that the right to discriminate because of competition is, in the language of this court in the Behlmer case, "*in every event to be enjoyed with due regard to the interests of the public, after giving full weight to the benefits to be conferred on the place from whence the traffic moved as well as those to be derived by the locality to which it is to be delivered.*"

EXTENT OF THE INJURY TO CHATTANOOGA FROM DISCRIMINATION IN FAVOR OF NASHVILLE, SHOWN BY TESTIMONY OF CHATTANOOGA MERCHANTS.

In determining, therefore, whether discrimination is justified to the extent shown, it is proper to consider the effect of that discrimination on the locality discriminated against. *For this purpose we call the attention of the court to the injury which has resulted to Chattanooga*

from the discrimination in rates against that city and in favor of Nashville, as shown by the testimony of leading Chattanooga merchants in all lines of business.

It appears, in the first place, from the testimony of those merchants, that Nashville competes with Chattanooga for business on the lines of the *Nashville, Chattanooga and St. Louis Railway* as far as Bridgeport, Ala., which is about 30 miles from Chattanooga and 121 miles from Nashville; on the line of the *Memphis and Charleston Railroad* as far as Scottsboro, Ala., which is 56 miles from Chattanooga and 125 miles from Nashville; on the line of the *Alabama Great Southern Railroad* as far as Rising Fawn, Ga., which is 26 miles from Chattanooga and 177 miles from Nashville; on the line of the *Western and Atlantic Railroad* at Ringgold, Ga., 23 miles from Chattanooga and 174 miles from Nashville; at Tunnel Hill, Ga., 31 miles from Chattanooga and 182 miles from Nashville; at Dalton, Ga., 38 miles from Chattanooga and 189 miles from Nashville; at Calhoun, Ga., 60 miles from Chattanooga and 211 miles from Nashville; at Cartersville, Ga., 90 miles from Chattanooga and 241 miles from Nashville; at Acworth, Ga., 100 miles from Chattanooga and 251 miles from Nashville; on the line of the *Southern Railway* at Cleveland, Tenn., 29 miles from Chattanooga and 189 miles from Nashville; at Athens, Tenn., 56 miles from Chattanooga and 207 miles from Nashville, and on the line of the *Cincinnati, New Orleans and Texas Pacific Railway*

(Cincinnati Southern) as far as Rathburn, Tenn., 22 miles from Chattanooga and 173 to Nashville.

(See testimony, in answer to interrogatory No. 4, of W. L. Magill, T. H. Payne, T. A. Snow, W. J. Dobbs, I. B. Merriam, and M. A. Timothy, Record, pp. 241, 243, 245, 247, 248, 251, 253).

It is thus seen that Nashville merchants compete with Chattanooga merchants for business at points immediately around Chattanooga in almost all directions, not only in territory between Chattanooga and Nashville, but also at points in Georgia and Alabama beyond Chattanooga from Nashville, and *in order to reach which goods from Nashville have to be hauled through Chattanooga;* and in this competition all these witnesses testify that Chattanooga merchants are placed at a disadvantage because of the lower rates to Nashville than to Chattanooga.

(See answers of above-named witnesses to interrogatory No. 5, Record, pp. 241, 243, 246, 248, 251, 254.)

T. H. Payne, a merchant of Chattanooga who has been engaged in the book, stationery, and wall-paper business at Chattanooga *for 31 years*, testifies as follows:

Question 6. "If, in answer to the preceding interrogatory, you say disadvantage exists and results from a discrimination in rates in favor of Nashville and against Chattanooga, give examples of this discrimination in rates in the sale of dry goods, groceries, hardware, and other commodities or classes of merchandise."

Answer. "In the stationery line—paper and envelopes to Nashville are 78 cents, to Chattanooga 98 cents, a difference of 20 cents per hundred pounds in the freight from New York. Nashville merchants can *sell* all the heavy and bulky goods, such as paper and envelopes, at the price Chattanooga merchants *pay*, and make a living profit. School slates in less than carload lots, freight to Nashville 42 cents, freight to Chattanooga 86 cents. At the average price of slates from one year to another, it costs about 40 cents on the dollar to lay them down in Chattanooga, while the same goods are hauled 151 miles farther and laid down in Nashville for about 20 cents on the dollar, making a difference of about 20 per cent in favor of Nashville, which prohibits the sale of these goods by Chattanooga merchants in territory reached by Nashville."

Question 7. "State how long discrimination in favor of Nashville and against Chattanooga has existed and what effect, if any, it has had upon the business prosperity of Chattanooga."

Answer. "It has existed for years, depressing business and retarding prosperity." (Record, 244.)

T. A. Snow, of the firm of T. A. Snow & Co., who have been dealers in stoves and house-furnishing goods at Chattanooga for *twenty-four years* testifies:

Question 7. "State how long this discrimination in favor of Nashville and against Chattanooga has existed, and what effect, if any, it has had upon the business and prosperity of Chattanooga."

Answer. "I think it has existed ever since I have been in business—that is, twenty-four years. We could never sell and make the same profits as the Nashville merchants. This discrimination has seriously affected the prosperity of Chattanooga." (Record, p. 246.)

W. J. Dobbs, who has been engaged in the wholesale grocery business in Chattanooga *for twenty-five years*, testifies:

Question 6. "If, in answer to the preceding interrogatory, you say disadvantage exists and results from a discrimination in rates in favor of Nashville and against Chattanooga, give examples of this discrimination in rates in the sale of dry goods, groceries, hardware, and other commodities or classes of merchandise."

Answer. "The rate of freight on canned goods, Baltimore to Chattanooga, is 45 cents in carload lots, and in less than carload lots 56 cents. From Baltimore to Nashville the rate is 33 cents in carload lots and 39 cents in less than carload lots, a difference of almost 40 per cent.

"On canned goods from New York to Chattanooga, carload lots, 48 cents; less than carload lots, 56 cents. From New York to Nashville, carload lots, 36 cents, and on less than carload lots 42 cents.

"On green coffee from Baltimore to Chattanooga our rate is 46 cents. Baltimore to Nashville the rate is 28 cents.

"On green coffee from New York to Chattanooga our rate is 49 cents; from New York to Nashville the rate is 31 cents.

"On keg soda from New York to Chattanooga our rate is 60 cents. From New York to Nashville the rate is only 36 cents. From New York to Louisville, Ky., the rate is only 12 cents. *We have been shipping in carload lots keg soda to Louisville and shipping via Nashville to Chattanooga at a cost of only 14½ cents. After paying the local rate from Louisville to Nashville and from Nashville to Chattanooga, we make a saving of over 15 cents.*

"On baking powder from New York to Chattanooga, on less than carload lots, 86 cents; in carload lots, 73 cents. From New York to Nashville, in less than carload lots, 60 cents, and on carload lots, 42 cents."

Question 7. "State how long discrimination in favor

of Nashville and against Chattanooga has existed, and what effect, if any, it has had upon the business and prosperity of Chattanooga."

Answer. "The freight discrimination in favor of Nashville has existed for years and years—ever since I have been in business (twenty-five years). It has prevented the Chattanooga jobbers from reaching out into the territory properly belonging to Chattanooga. The Chattanooga jobbers can only sell in the extreme part of their territory such goods as rates of freight do not enter into their consideration on account of their lightness, as extracts of bluing and other small items. Also goods sold on equality plan—that is, where the buyer is allowed the freight from the shipping point to his destination, or a delivering price named by the manufacturer, putting every jobber on an equal footing, regardless of his location."

Question 14. "What effect, if any, do relatively high rates to a locality, or rates which discriminate against a locality, have on its prosperity and progress?" * * *

Answer. "It has a tendency to break down commerce and prevents a merchant from increasing his force, decreases profits, and paralyzes business in general."

Question 26. "Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

Answer. "* * * Such discrimination existing, it is utterly impossible for Chattanooga merchants to maintain their legitimate territory. It is absolutely wrong for Nashville to have such material advantage in competing with others in a common market. Chattanooga merchants are entitled to their natural advantages. It is very subduing to Chattanooga jobbers, when competing with Nashville merchants, to know that Nashville enjoys so much lower rates from all points, regardless of geographical location. There are

comparatively few goods shipped from the East to either Chattanooga or Nashville via Cincinnati. Nearly all shipments from the East to Nashville come through Chattanooga, as the distance from New York to Nashville via Chattanooga is 1,014 miles, and from New York to Nashville via Cincinnati is 1,053 miles.

"*The through rates from the East to Chattanooga in many instances are higher than the rate through from New York to Chattanooga via Nashville, paying local rates from Nashville to Chattanooga. In other words, sometimes goods are shipped in carload lots to Nashville and reshipped to Chattanooga, taking the local rate out of Nashville to Chattanooga, and a slight saving is made over the through rate from New York to Chattanooga.*" (Record, pp. 248, 249, 251.)

I. B. Merriam, who has been engaged in the wholesale grocery business in Chattanooga *for 18 years*, testifies:

Question 5. "State whether Chattanooga merchants, in competing with Nashville merchants, * * * are subjected to any disadvantage; and if so, state what this disadvantage results from."

Answer. "The Chattanooga merchants are at a disadvantage in competing with Nashville merchants, and this arises from the fact that the rates from the East on freight are so much lower to Nashville than to Chattanooga that it enables the merchants of Nashville to reship their goods and sell them at lower rates than is possible for Chattanooga merchants in the same territory."

Question 6. "If, in answer to the preceding interrogatory, you say this advantage exists and results from a discrimination in rates in favor of Nashville and against Chattanooga, give examples of this discrimination in rates in the sale of dry goods, groceries, hardware, and other commodities or classes of business."

Answer. "The rate from New York to Nashville on coffee is 31 cents, passing through Chattanooga, and from New York to Chattanooga 49 cents, *enabling Nashville to ship coffee from New York to Nashville and come back to Chattanooga on the same line for less than Chattanooga gets her rates from New York.*

"Canned goods from Baltimore to Nashville 35 cents per hundred pounds, and to Chattanooga 48 cents, giving them the same advantage as in coffee.

"This discrimination in favor of Nashville and against Chattanooga continues through all other lines shipped from the East." (Record, pp. 251, 252.)

In answer to the general interrogatory given above, No. 26, this witness (I. B. Merriam) testified:

Answer. "The rates of freight as given in my testimony from New York to Chattanooga and to Nashville give Nashville a chance to undersell Chattanooga at all competitive points and force Chattanooga out of the market at these points. As an illustration, *7 years ago Chattanooga had 7 wholesale grocery stores and she now has 4; she had 2 wholesale dry goods stores, she now has 1; she had 2 wholesale shoe stores; she now has 1. The volume of trade has increased in Nashville, but has not increased in Chattanooga.*" (Record, p. 253.)

Judge Severens, in commenting upon the excess of the Chattanooga rates over those to Nashville, says:

"The result is that the merchants of Chattanooga can ship their goods from the East through to Nashville on the Nashville rate and then ship them back to Chattanooga on local rates at less cost than the charges on an original shipment direct to Chattanooga. The natural result is that the merchants and tradesmen of Nashville can undersell the merchants and tradesmen of Chattanooga in much of the commercial sphere of the latter

place, for the Nashville people can ship directly to the points tributary to Chattanooga; and the evidence shows it is the practical result. *There is evidence also tending to show that the commercial business of Chattanooga has for years been stagnating. It may be and probably is true that this is in part due to other causes, but considering that no small part of the value of goods shipped over the long distance from the Eastern markets to Chattanooga is represented by the freight rates it has borne, it would be manifest without other evidence that the great disparity of rates above shown would go far to crush out the commercial life of a city so heavily burdened.*" (Record, p. 371.)

Discrimination is contrary to natural right and abhorrent to the law. The leading feature of the act to regulate commerce is the provision of a remedy for unjust discrimination, and *in particular for discrimination as between different localities.* In the language of the Supreme Court of the United States in Union Pacific Company *v.* Goodrich (149 U. S., 680), the law was designed to "*cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, and favored corporations.*"

If discriminations such as are shown by the undisputed evidence in this case, resulting in material damage and the grossest injustice to Chattanooga, do not fall within the evil intended to be remedied by the act to regulate commerce, then it will be difficult to conceive of a case of discrimination which would come within the purview of that act.

Discriminations which result in the very abuses which the act to regulate commerce was designed to remedy can not be justified under the act.

We have shown that the competition on transportation from the Eastern seaboard would, under normal conditions, be greater at Chattanooga than at Nashville, and, therefore, the Chattanooga rates should be at least as low as, if not absolutely lower than, the Nashville rates; but we contend that, even if the proof showed actual competition of greater force at Nashville than at Chattanooga, the discrimination practiced in this case is excessive, and that to allow competition to justify such discrimination will be to nullify the law itself.

Chapter XI.

SIXTH PROPOSITION.

THE ORDER OF THE COMMISSION, HOW IT MAY AND SHOULD BE ENFORCED.

IF ENFORCED BY REDUCING CHATTANOOGA RATES, WILL NOT RESULT IN LOSS OF REVENUE TO CARRIERS.

MAY BE ENFORCED BY ADVANCING NASHVILLE RATES WITHOUT DIVERTING TRAFFIC TO COMPETING LINES.

Our sixth proposition in answer to the plea of competition is—

That, inasmuch as the order of the Commission is simply that the carriers desist from charging higher rates to Chattanooga than to Nashville, it may be complied with, if the carriers so elect, by giving Chattanooga rates as high as those to Nashville, thus ignoring the natural advantage of the former in being the shorter distance point, and this will be a reasonable allowance for any possible dissimilarity of conditions resulting from the competition at Nashville shown in this case.

Such being the character of the order of the Commission, the carriers may bring themselves within its letter, if not within its spirit, by leaving the Chattanooga rates as high as the Nashville rates. The order does not require that the Chattanooga rates shall be as high as

the Nashville rates, and if the carriers pursue that course, it will be their voluntary act in the exercise of the discretion left them under the order.

Inasmuch as the factors of competition are greater at Chattanooga than at Nashville and under *normal* conditions the competition at Chattanooga would be greater than at Nashville, the rates to Chattanooga should be less than to Nashville. The Commission, however, has always pursued a conservative course, and in its orders has left the carriers a margin so as to avoid any possibility of injury to them. Conceding *arguendo* that there is a greater force of competition at Nashville than at Chattanooga, the option left the carriers under the order to leave the Chattanooga rates as high as the Nashville rates makes due allowance for any dissimilarity of conditions resulting therefrom.

It having been held by this court that the Commission has no power to prescribe rates (I. C. C. *v.* Railway Company, 167 U. S., 479), the Commission could not do *exact justice* by fixing the rates to be charged to Chattanooga and Nashville, respectively. Its order pursues the language of section 4 of the law, and affords relief both under that section and under section 3—section 4, prohibiting the greater charge for the shorter than the longer haul, being in the nature of a *specification* under the general provision of section 3, prohibiting undue preferences in rates as between different localities.

HOW THE ORDER MAY BE ENFORCED.

It is not for the court to determine how the carriers shall comply with the order of the Commission, but as counsel for the carriers has displayed great ingenuity in attempting to show that there is no practical mode of complying with the order without inflicting great and unreasonable loss upon the defendant carriers, it is a proper matter for consideration.

The order being simply that the Chattanooga rates shall not exceed the Nashville rates, the carriers are left the discretion to comply with it either by advancing the Nashville rates or reducing the Chattanooga rates, *or by both such advance and reduction in certain proportions.*

The latitude given the carriers in the order, instead of being appreciated as a favor, is complained of and made a ground of objection. If the Commission had in its order dictated *the mode* in which it should be obeyed, counsel for carriers would have denounced it as an inflexible cast-iron order, unauthorized by law.

FALSE ASSUMPTION THAT COMPLIANCE WITH ORDER WILL REQUIRE EITHER AN ADVANCE OF THE NASHVILLE RATES OR A REDUCTION OF THE CHATTANOOGA RATES TO THE FULL EXTENT OF THE DIFFERENCE BETWEEN THOSE RATES.

In taking the testimony before the court in behalf of the carriers, counsel assumed that the order of the Commission could only be obeyed by advancing the Nashville rates or reducing the Chattanooga rates to the *full extent of the difference* now existing between those rates. In answer to interrogatories *framed on this assumption*, his witnesses gave it as their opinion that *such* an advance of the Nashville rates over the defendants' lines would divert the traffic to other lines, and that such reduction in the rates to Chattanooga would result in an unreasonable loss of revenue to the carriers transporting the traffic to Chattanooga.

That this assumption is false is clear from the fact *that the rates to Chattanooga may be made not higher than those to Nashville by reducing the Chattanooga rates to the extent of one-fourth, one-third, one-half, two-thirds, or other proportion of the difference between the two sets of rates, and advancing the Nashville rates to the extent of three-fourths, two-thirds, one-half, one-third, or other proportion of that difference.*

If it be true, as testified by the witnesses for the carriers, that an advance of the rates to Nashville or a

reduction of the rates to Chattanooga to the *whole extent* of the difference between those rates would result disastrously to the carriers, it does not follow that such consequences would flow from an advance of the one and reduction of the other in certain proportions of the difference between them.

This proof, therefore, on the part of the carriers might be true, and still not afford them justification or excuse for noncompliance with the order of the Commission.

COMPLIANCE WITH THE ORDER BY A REDUCTION OF THE CHATTANOOGA RATES.

THE ORDER SHOULD BE COMPLIED WITH BY REDUCING THE CHATTANOOGA RATES.

It is shown in a subsequent chapter of this argument (Chapter XVII) that the rates from the Eastern seaboard to Chattanooga are excessive, not only relatively as compared with the Nashville rates, but absolutely. This being the case, the order should be complied with by a reduction of the Chattanooga rates. The Commission so recommends in its report and opinion. On this point the Commission says:

"It seems improbable that the discrimination complained of can be made less oppressive by any increase in the Nashville rate, and on that assumption the only practical relief is a reduction in rates to Chattanooga." (Record, p. 54.)

This reduction, as we have shown above, may be made in various proportions of the difference between the Chattanooga and Nashville rates, less than the total of that difference, and result in rates not higher to Chattanooga than to Nashville, provided it is accompanied by proportionate advances in the Nashville rates.

A REDUCTION IN THE CHATTANOOGA RATES IS OBJECTED TO ON THE GROUND MAINLY THAT IT WILL RESULT IN LOSS OF REVENUE TO THE ROADS.

(*a*) If the rates to Chattanooga are reduced to the full extent of the difference between those rates and the Nashville rates, witnesses for the roads testify there would be a loss of revenue, but the amount of the loss is not given. That loss can not be greater than the damage resulting to Chattanooga from the present adjustment of rates. Some idea of the extent of that damage may be had from the fact that, according to the undisputed testimony, Chattanooga's wholesale grocery stores have during the last seven years been reduced from 7 to 4 and her wholesale dry goods stores and shoe stores from 2 to 1.

It is a self-evident proposition that the law did not contemplate that a carrier, in protecting itself from loss, should inflict a serious and immeasurably larger loss upon a community—a portion of the public—located at one of its termini.

(*b*) NO LOSS OF REVENUE WILL RESULT. *The opinion of railroad witnesses that a reduction in the rates to Chattanooga would be attended by loss of revenue to the roads is based on the false assumption that there would be no increase in the tonnage of traffic to Chattanooga under such reduced rates.* The universally recognized facts that a reduction in rates to a locality, so as to put it in a position of relative equality with its competitors, advances the prosperity of such locality, increases its business, and hence enlarges the tonnage of traffic transported to it, is wholly ignored by witnesses for the roads.

Mr. Aldace F. Walker, who was then a member of the Interstate Commerce Commission, but who resigned that position to accept employment from the roads, and whose views, *since his resignation*, are of great weight with carriers, said in an opinion of the Commission prepared by him (3 I. C. C. R., pp. 48–9):

"They say that the railroads must live or there can be no commerce by rail, and they insist *that any reduction of rates means loss of revenue*, which is against the public interest and the carrier's right, unless the rate in question be unreasonable *per se; but it is not clear that the application of the general rule of the law*" (the long and short haul rule of sec. 4) "*means permanent loss of revenue. The stimulus given to business at intermediate points will increase traffic largely. That proposition has been so often practically demonstrated that no intelligent observer can reject it.*"

The decision of this court in Chicago *v.* Wellman (143 U. S., p. 343) is to the same effect. In that case this court says:

"May it not be possible—indeed, *does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and, therefore, the earnings?*"

A reduction in the rates to Chattanooga so as to place that city on an equal footing with Nashville would so increase the tonnage of traffic to Chattanooga that the revenue of the carriers would be augmented rather than diminished. *The carriers are losing revenue because of their discriminations against Chattanooga.* Instead of transporting traffic for 7 or more wholesale grocery houses they are transporting for only 4, and instead of hauling traffic for 2 or more wholesale dry goods and shoe houses they are hauling for only 1.

Not only will there result a greater tonnage of traffic hauled to Chattanooga *from an increase in Chattanooga business*, but also from the *increased demand by consumers* resulting from the lower prices brought about by lower rates. To this effect is the following extract from the opinion of this court in the "Joint Traffic Association Case" (171 U. S., 505):

"The result of lower rates is generally a *greater demand* for the articles transported, and this greater demand can only be gratified by *a larger supply*, the furnishing of which increases commerce. * * * (171 U. S., p. 576.)

COMPLIANCE WITH THE ORDER BY AN ADVANCE OF THE NASHVILLE RATES.

The contention is that if the rates by the lines through Chattanooga to Nashville (the lines involved in this case) are advanced to the *full extent* of the difference between the Nashville and Chattanooga rates, the result will be that the line via Cincinnati will retain its present rates and thus secure all the traffic; that the Nashville, Chattanooga and St. Louis Railway would suffer injury in the loss of the traffic, and that Chattanooga would get no relief.

In coming to this conclusion counsel ignores the significant fact that on the route from the eastern seaboard via Cincinnati to Nashville the portion of the through rate for the haul from Cincinnati to Nashville *is the rate of the Louisville and Nashville Railroad and made by that company alone*, and the further facts stated in the following extract from the opinion of the circuit court of appeals in this case:

> The Louisville and Nashville Railroad Company, "through its ownership of a majority of the stock of the Nashville, Chattanooga and St. Louis Railway Company, which operates a road from Nashville through Chattanooga to Atlanta, its joint operation of the railroad of the Georgia Central Railroad and Banking Company from Atlanta to Savannah in connection with the Ocean Steamship Company, of which the Georgia Central Company owns all the stock, *is very largely interested in traffic from the eastern seaboard to Chattanooga and through Chattanooga to Nashville.*"
> (Record, p. 414; stipulation, record, pp. 258, 259.)

The Louisville and Nashville Railroad Company is thus seen to be interested, not only as the owner of a majority of the capital stock of the Nashville, Chattanooga and St. Louis Railway, which extends from Nashville to Chattanooga and leases the line of the Western and Atlantic road from Chattanooga to Atlanta, but is also interested in the entire through line from Nashville *via Chattanooga* and Atlanta to Savannah and thence by ocean to the eastern seaboard.

Is it to be believed that, in the event the rates of the Nashville, Chattanooga and St. Louis Railway are advanced, the Louisville and Nashville road would refuse to protect by an advance of its own rates its financial interest in the former road and in the entire line from Nashville *through Chattanooga* to the eastern seaboard?

We have heretofore shown in Chapter IV that, *as held by the circuit court of appeals*, the proportion of the through rate from the eastern seaboard charged by the Louisville and Nashville Railroad for the haul from Cincinnati to Nashville may be advanced so as to make the Nashville rates as high as the Chattanooga rates without diverting the traffic to the river line from Cincinnati or Paducah or Evansville to Nashville.

After stating that practically all the local traffic from Cincinnati to Nashville (as well as the through traffic from the eastern seaboard) went by the rail line of the Louisville and Nashville road, notwithstanding the

river rates were only about one-half of the rail rates, the circuit court of appeals says:

"The local railway rates to Nashville from Ohio River points" (Cincinnati, Louisville, and Evansville) "are about 50 per cent higher than the through rates on New York shipments between the same points. To make the through New York rate to Nashville the same as that to Chattanooga the Louisville and Nashville Company will not have to charge as much for its part of the carriage as its local rates. If the local rates have reduced river transportation to a minimum, it is clear that any increase on through rates, under which they would still be less than local rates, can not affect river competition at all. In other words, the margin of possible increase in the through rates, without affecting river competition, includes all the increase in rates required to comply with the order appealed from, even if the carriers elected to bring about the equality enjoined in the order by increasing the Nashville rate to the Chattanooga rate."

(Record, bot. p. 411.)

The Louisville and Nashville Railroad was not originally made a party defendant to this proceeding, but so great was its interest in the matter in controversy that it voluntarily appeared and filed an answer, in which it takes pains to set forth its interest in the line which we have mentioned above, from Nashville via Chattanooga, Atlanta, and Savannah to the eastern seaboard, and it was subsequently made a party defendant by formal order of the Commission.

(See Record, pp. 87, 104.)

If the Louisville and Nashville Railroad, notwithstanding its interest in the line from Nashville *through*

Chattanooga to the eastern seaboard, should refuse to advance its rates on an advance of the rates by that line, then it will be open to the charge of contumacy; in other words, to the charge of being actuated by a purpose to render nugatory the order of the Commission and the decree of the courts.

Counsel for the carriers strenuously contends that while the proportion of the through rate from the eastern seaboard via Cincinnati charged by the Louisville and Nashville Railroad for the haul from Cincinnati to Nashville pays something in excess of the cost of transportation, *it does not yield full and adequate remuneration.* If this be so, and if it be true, as held by the circuit court of appeals in the above extract from its opinion, that an increase of its rates would not divert traffic to the river line, then it would seem *the Louisville and Nashville road would be glad of an opportunity to make its rates adequately remunerative.*

Conceding that the line involved in this case *via Chattanooga* to Nashville may comply with the order by advancing the Nashville rates, and that the Louisville and Nashville road may not correspondingly advance its rates from Cincinnati to Nashville, is this a valid ground for holding the order of the Commission to be unlawful and for refusing to decree its enforcement? The presumption is that the line through Chattanooga will pursue the natural and proper course by reducing the Chattanooga rates.

CHAPTER XII.

THE ORDER OF THE COMMISSION CONTINUED.

OBJECTION TO ADVANCE OF NASHVILLE RATES ON THE GROUND THAT NASHVILLE MUST BE PROTECTED IN HER COMPETITION WITH CINCINNATI, LOUISVILLE, AND EVANSVILLE.

OBJECTION TO ADVANCE OF NASHVILLE RATES ON THE GROUND THAT "THE LOUISVILLE AND NASHVILLE RAILROAD IS VITALLY INTERESTED IN MAINTAINING THE COMMERCIAL IMPORTANCE OF NASHVILLE."

But it is said by counsel in his briefs, "THE LOUISVILLE AND NASHVILLE RAILROAD IS VITALLY INTERESTED IN MAINTAINING THE COMMERCIAL IMPORTANCE OF NASHVILLE," and that it is necessary to give Nashville rates not higher than the present rates to "*enable Nashville to compete with Cincinnati, Louisville, and Evansville in the territory between Nashville and the Mississippi River.*"

Here also is the fact that the rates from Cincinnati, Louisville, and Evansville to Nashville and from Nashville to those cities are the rates of the Louisville and Nashville Railroad and are made by that road alone.

The "*maintenance of the commercial importance of Nashville*" being so "*vital*" to the Louisville and Nashville Railroad, it could, if an advance in rates from the East to Nashville become necessary, easily readjust its rates from Nashville to Cincinnati, Louisville, and Evansville so as to protect Nashville in its competition with those cities.

The truth is, the Louisville and Nashville Railroad and the Nashville, Chattanooga and St. Louis Railway are practically *one system*. The rates over the latter from Chattanooga to Nashville, as well as those over the former from Cincinnati to Nashville, are made by the former. *When you strike the one you strike the other.* If the Louisville and Nashville Railroad, in the language of counsel for the roads, is "*vitally interested in maintaining the commercial importance of Nashville,*" *it is equally a "vital" matter to the Nashville, Chattanooga and St. Louis Railway, dominated, as it is, by the former.*

A flood of light is thrown upon the "true inwardness" of the "startling" discriminations against Chattanooga in favor of Nashville by the declaration of counsel for the carriers, that "the Louisville and Nashville Railroad is VITALLY interested in maintaining the commercial importance of Nashville."

If the Louisville and Nashville Railroad is "vitally interested in maintaining the commercial importance of Nashville," *the administration of justice is vitally inter-*

ested in seeing that the commercial importance of Nashville is not maintained at the expense of Chattanooga and by means of the grossest discriminations against that city.

The circuit court, in commenting upon the above statement of counsel for the carriers as a ground for giving Nashville low rates, that "THE LOUISVILLE AND NASHVILLE RAILROAD IS VITALLY INTERESTED IN MAINTAINING THE COMMERCIAL IMPORTANCE OF NASHVILLE," says:

"In the full and elaborate brief of counsel for the railways several reasons are advanced why it would be difficult to so readjust the rates as not to discriminate against Chattanooga. Attention has been given to all of them; but none of them, in my opinion, rests on any sufficient ground or constitutes any valid justification. *One of these reasons is so striking and significant that it deserves special consideration. It is urged that the Louisville and Nashville Railroad Company is vitally interested in maintaining the commercial importance of Nashville, and can not, with due regard to that purpose, so adjust the rates at that place as to enable the respondents to do otherwise than discriminate against Chattanooga;* but it appears that that company owns and controls a majority of the stock of the Nashville, Chattanooga and St. Louis Railway Company, the respondent carrier which constitutes that part of the through lines which extends from Chattanooga to Nashville, and fixes the rates for that road. It is therefore in a position to insure to Nashville such concessions as to advance its favoring purpose with reference to that city. It really has no competition there unless it be from the navigation of the Cumberland River.

* * * * *

"Now, the purpose to increase the commercial prosperity of Nashville is in itself a laudable one, and the

court would be far from having any inclination to obstruct it when it is pursued in a lawful way. *It is to be hoped and believed, however, that the carriers will be able to find a way to remedy the injustice of the present situation without prejudice to any beneficent purpose toward Nashville. But it is a hard measure of justice to Chattanooga if the upbuilding of the one city is to be done at the charge of the other, by selecting the latter as one to bear the oppressive rates which shall go to make up for the moderate rates charged at the former.*" (Record, pp. 376, 377.)

The circuit court of appeals in its opinion in this case, in commenting upon this "vital interest of the Louisville and Nashville Railroad in the commercial importance of Nashville," says:

"Nor can it be said that the Louisville and Nashville Company, *whose fostering care of Nashville is insisted upon in the evidence and briefs for defendants*, and is offered as a motive for its low rates to Nashville, is not a party to the *plan by which Chattanooga is prevented from enjoying the natural traffic advantages which her railroads and her situation ought to give her.*" (Record, mid. p. 414.)

CHAPTER XIII.

THE ORDER OF THE COMMISSION CONTINUED.

OBJECTION TO COMPLIANCE WITH ORDER BY REDUCTION OF CHATTANOOGA RATES ON THE GROUND THAT IT WILL NECESSITATE A READJUSTMENT OF RATES TO ROME, DALTON, FLORENCE, AND OTHER LOCALITIES GROUPED WITH CHATTANOOGA.

(*a*) The above objection to a reduction in the Chattanooga rates—that it will necessitate a readjustment of rates to Dalton, Rome, Florence, Decatur, Meridian, Enterprise, and other points having the same rates as Chattanooga—is without force.

If that be recognized as ground for overruling the order of the Commission, then no order correcting unlawful rates to a locality which competes with other localities can be enforced, and the law will be a nullity. All points of any importance compete with others.

If the rates to Chattanooga are unlawful, then rates to other localities, based on or adjusted with reference to those unlawful rates, are themselves unlawful or on a false basis, and call for correction or readjustment. It can not be held to be a valid objection to the correction of unlawful rates to one locality, that it involves a like correction to other localities.

On this point the circuit court says:

"It is urged that the enforcement of this order will disturb the whole scheme of freight rates in a wide section. I am fully conscious of the responsibility I must assume in giving effect to the order, though my expectation is that the companies will find less difficulty in conforming to the order than their counsel seems to fear. *But however that may be, the duty of the court to right the injustice encountered is plain. Surely it can not be contended that the rights of one community can be so entangled by a system of rates affecting many others also that justice can not be done when those rights are denied or withheld.*" (Record, bottom p. 380, top p. 381.)

In commenting upon this matter the circuit court of appeals uses the following language:

"We are pressed with the argument that to reduce the rates to Chattanooga will upset the whole southern schedule of rates and create the greatest confusion; that for a decade Chattanooga has been grouped with towns to the south and west of her, * * * and that her rates have been the key to the southern situation. The length of time which an abuse has continued does not justify it. It was because time had not corrected abuses of discrimination that the interstate-commerce act was passed. The group in which Chattanooga is placed, * * * *puts her on an equality in respect to eastern rates with towns and cities of much less size and business, and much further moved from the region of trunk line rates and with much fewer natural competitive advantages.* If taking Chattanooga out of this group and putting it with Nashville requires a readjustment of rates in the South, *this is no ground for refusing to do justice to Chattanooga.*"
(Record, p. 415).

The evidence for the roads before the court shows that the rates to Chattanooga, Dalton, Rome, etc., and

all competitive points in Southern territory (territory east of the Mississippi and south of the Ohio and Potomac rivers) were established and are maintained by *agreement* between the carriers interested therein. (Answers of Van Den Burg to cross-questions 82–6, Record, 140.) They can be readjusted to Chattanooga, Rome, Dalton, etc., *by agreement*, so as to be brought into conformity with the law without injustice to any locality or interest.

"*Where there is a will there is a way.*" The carriers are constantly solving with ease rate problems much more difficult than that involved in any readjustment of rates to other points which may be rendered necessary by bringing Chattanooga rates in line with the rule of the law. The "way" is not wanting, but the "will." *To plead inability is to confess incompetence.*

THE TWIN SCARECROWS.

The twin scarecrows, bankruptcy of carriers and readjustment of rates to localities competing with the locality making complaint, are paraded by counsel for carriers in all these cases. *They were paraded before the courts in the Social Circle case. The courts were told that making the rates to Social Circle not higher than to Augusta would necessitate a like change in rates to all stations around Social Circle and between Social Circle and Augusta, and that this would bring bankruptcy to the carriers. The order of the commission was sustained, and, so far as we have*

heard, none of the dire consequences predicted have resulted from its enforcement.

(*b*) THE RATES TO CHATTANOOGA AND LOCALITIES GROUPED WITH CHATTANOOGA SHOULD BE READJUSTED.

THIS READJUSTMENT SHOULD BE BY REDUCING CHATTANOOGA RATES, CHATTANOOGA BEING THE SHORTER DISTANCE POINT, WITH GREATER COMPETITIVE AND NATURAL ADVANTAGES.

The statement by the circuit court of appeals in the above extract from its opinion, that "*the group in which Chattanooga is placed puts her on an equality in respect to eastern rates with towns and cities of much less size and business and much farther removed from the region of trunk-line rates and with much fewer natural competitive advantages,*" *shows that a readjustment of rates is necessary in order to do justice to Chattanooga.*

The localities with which Chattanooga is grouped are twenty-four in number and all of these localities are longer distance points from the eastern seaboard than Chattanooga, and, as stated by the circuit court of appeals, "of much less size and business and much further removed from the region of trunk-line rates and with much fewer natural competitive advantages."

Among the most important of these localities grouped with Chattanooga are Decatur, Florence, Tuscumbia,

Sheffield, Ala., and Meridian and Enterprise, Miss. The haul from the eastern seaboard to Decatur is 122 miles longer than to Chattanooga; to Tuscumbia and Sheffield, 165 miles longer; to Florence, 171 miles longer, *and to Meridian, 296 miles and to Enterprise 311 miles longer than to Chattanooga.* All these points, however, have rates from the eastern seaboard as low as the Chattanooga rates.

This demonstrates that a readjustment of rates in this group is called for, *and that such readjustment should be brought about by a reduction in the Chattanooga rates.* It further shows that such reduction in the Chattanooga rates will not necessitate a reduction in the rates to the other more distant, less important localities, possessing "much fewer natural competitive advantages" than Chattanooga. By such reduction of the Chattanooga rates, the relation between the Chattanooga rates and the rates to such other localities will be made to more closely *approximate justice.*

One of the counsel for the carriers, while making the concluding argument for the carriers in the circuit court of appeals, was asked by a member of the court how this so-called system of rate making which prevailed in this territory in which Chattanooga and Nashville are located came into existence. He could give no satisfactory answer to the question and finally stated that it was "haphazard."

The gross discrimination under this so-called system is sufficient in itself, without this admission of counsel for carriers, to show *that the present adjustment of rates in this territory is not the result of methodical or intelligent arrangement.*

It is certainly high time that this "*haphazard*" condition of things was done away with, and the statement of counsel for the carriers in reply to the question of the court is a strong argument in favor of a readjustment of rates in this section of the country, and shows the necessity for such remedial legislation as that embodied in the act to regulate commerce.

Chapter XIV.

THE ORDER CONTINUED.

OBJECTION TO COMPLIANCE WITH ORDER BY REDUCTION OF CHATTANOOGA RATES ON THE GROUND THAT IT WILL GIVE CHATTANOOGA THE ADVANTAGE OF ROME, DALTON, FLORENCE, AND OTHER TOWNS IN THE SAME GROUP.

NASHVILLE, UNDER EXISTING RATES, HAS A GREATER ADVANTAGE OVER THESE LOCALITIES THAN CHATTANOOGA WOULD HAVE ON A REDUCTION OF HER RATES TO THE LEVEL OF THE NASHVILLE RATES.

TENDER REGARD FOR NASHVILLE AND FOR ROME, DALTON, FLORENCE, ETC.; NONE FOR CHATTANOOGA.

We have shown in the preceding chapter that, as held by the circuit court of appeals, Chattanooga is entitled, by reason of her natural advantages, to lower rates than the other localities with which she is grouped.

It is strenuously urged, however, that a reduction of the Chattanooga rates will give Chattanooga an unjust advantage over Rome, Dalton, Florence, Decatur, Meridian, Enterprise, and eighteen other points having the same rates as Chattanooga unless the rates to those points are also correspondingly reduced.

The fact is ignored that under the existing lower rates to Nashville than to Chattanooga and all these twenty-four points having the same rates as Chattanooga, *Nashville has an unjust advantage not only over Chattanooga, but also over those other points.*

Among the most important of those other points are Florence, Tuscumbia, Sheffield, and Decatur, Ala. Nashville is the same distance by rail from Decatur as Chattanooga—122 miles—and is nearer to Florence, Tuscumbia, and Sheffield than is Chattanooga. The distances to those four points from Nashville and Chattanooga, respectively, are as follows:

From—	To—			
	Florence.	Decatur.	Tuscumbia	Sheffield.
Nashville	127 miles via L. & N.	122 miles via L. & N.	135 miles via L. & N.	132 miles via L. & N.
Chattanooga	171 miles via Sou. Ry.	122 miles via Sou. Ry.	165 miles via Sou. Ry.	168 miles via Sou. Ry.

Nashville, being a shorter distance from Florence, Tuscumbia, and Sheffield than Chattanooga, under existing lower rates to Nashville than to those three points, has a greater advantage over them than would Chattanooga under the same rates.

To a large number of the remaining twenty points of the twenty-four to which the rates are the same as to

Chattanooga, the distances from Nashville are not materially greater than from Chattanooga.

SOLICITUDE FOR NASHVILLE; NONE FOR CHATTANOOGA.

NASHVILLE INTERESTS PROTECTED IN ALL DIRECTIONS; CHATTANOOGA INTERESTS SACRIFICED IN ALL DIRECTIONS.

It is insisted that the rates to Nashville must not be advanced, because such advance would cripple Nashville in her competition with Louisville, Evansville, etc., and that the rates to Chattanooga must not be reduced, because such reduction would give Chattanooga an advantage over Rome, Dalton, etc.

Why are Rome, Dalton, etc., to be protected in their competition with Chattanooga, and Nashville in her competition with Louisville, Evansville, etc., and Chattanooga not to be protected in her competition with Nashville?

In the opinion of counsel for the carriers, it would seem that discrimination against Chattanooga, no matter how "startling," is a matter of no consequence, but that discrimination against Dalton, Rome, etc., or against Nashville, is too horrible to be contemplated with equanimity.

While Nashville is allowed to compete on equal terms in territory north of her, and is given the advantage over Chattanooga and the twenty-four points having

the same rates as Chattanooga south of Nashville and southwest of Chattanooga, Chattanooga, in fact, has no territory whatever in which she is not at a disadvantage, either in respect to Nashville or the twenty-four points having the same rates. It is manifest that Chattanooga, having as high rates as the *longer distance smaller points*—Rome, Dalton, Sheffield, Tuscumbia, Decatur, etc.—can not compete with those points in their territory, as Chattanooga would have to pay the same rates that those points pay for delivery of goods at Chattanooga, and then the additional transportation charges necessary to carry the goods from Chattanooga on.

Why is such tender solicitude manifested for Nashville in her competition with Louisville and Evansville, and for Rome, Dalton, etc., in their competition with Chattanooga, and none whatever manifested for Chattanooga in her competition with Nashville or with Rome, Dalton, etc.? *Why, also, is no solicitude manifested for Rome, Dalton, etc., in their competition with Nashville? If it be an outrage for Chattanooga to have an advantage over Rome, Dalton, etc., why is not this the case also as to Nashville?*

It is creditable to the carriers that this gross injustice done Chattanooga, and Rome, Dalton, etc., is, as their counsel stated, not the result of design, but merely of accident.

Chapter XV.

THE ORDER OF THE COMMISSION CONTINUED.

THE ORDER OF THE COMMISSION IS ADAPTED TO ENFORCE SECTION 3 AS WELL AS SECTION 4—IF SECTION 4 DOES NOT APPLY, SECTION 3 DOES.

The order of the Commission, it will be seen, is equally as well adapted to the enforcement of section 3 as to the enforcement of section 4.

It will not only do away with the higher rates for the shorter haul to Chattanooga than to Nashville, *forbidden by section 4*, but also remedy—in a measure, at least—the unjust prejudice or disadvantage to Chattanooga resulting from those higher rates to Chattanooga, *forbidden by section 3*.

Because of the higher rates to Chattanooga than to Nashville, Chattanooga is unduly prejudiced and placed at an unjust disadvantage in that, as shown by the testimony in this case (see original printed argument for appellee, pp. 70–78), Chattanooga merchants are unable to compete on equal terms with Nashville merchants, not only in territory immediately around Chattanooga, which is naturally tributary to Chattanooga, but also in territory equidistant from the two cities.

By removing the cause, namely, the higher rates to Chattanooga than to Nashville, the order of the Commission will enable Chattanooga merchants to compete on equal terms with Nashville merchants and do away with this undue prejudice or disadvantage to Chattanooga, thus giving the proper relief under section 3.

We contend that the dissimilarity of conditions, so far as competition or the elements of competition are concerned, are decidedly in favor of Chattanooga.

The charging of a higher rate to Chattanooga than to Nashville, when the dissimilarity of conditions, so far as competition or its elements are concerned, is in favor of Chattanooga, is certainly an undue preference under section 3 against Chattanooga and in favor of Nashville.

Counsel for the carriers admits in his briefs filed in the lower courts that although the Commission "may have erred in basing the order made by it in this case on the fourth section, yet if said order is lawful under the third section it will be the duty of the court to enforce it." He then says:

"Though the circumstances and conditions at the longer distance point may be substantially dissimilar from those at the shorter distance point, and though such dissimilarity may take the case out of the operation of the fourth section, the third section remains; and if it can be shown by the appellee that the disparity in rates constitutes an undue preference of the longer distance point, the rates may be declared to be unlawful."

CHAPTER XVI.

THE ORDER OF THE COMMISSION CONTINUED.

THE ORDER IS PRIMA FACIE LAWFUL; BURDEN UPON THE CARRIERS TO SHOW CLEARLY THAT IT IS UNLAWFUL.

THE ORDER NOW HAS THE SANCTION OF THE COMMISSION AND TWO COURTS.

The maxim or rule that all things are to be presumed "to be rightly done until the contrary is made to appear," which is invoked in aid of acts of public officers, tribunals, and administrative boards, performed in the discharge of their duties, applies with equal force to an order of the Interstate Commerce Commission, which is a bureau, tribunal, or administrative board of the Government established by the law of the land, and *whose orders are not ex parte, but the result of judicial investigation.*

THE ORDER OF THE COMMISSION NOW HAS THE SANCTION OF THREE TRIBUNALS.

As stated at the outset of this argument, the order of the Commission now has the sanction of three tribunals:

1. That of the Interstate Commerce Commission, a tribunal or administrative board created solely for the

investigation of questions of this character, having large experience in such investigations, and being given by the law special facilities for securing full and accurate information in reference thereto.

2. That of the United States circuit court for the eastern district of Tennessee, Judge Severens rendering the decision.

3. That of the United States circuit court of appeals for the sixth circuit, composed of Mr. Justice Harlan and Circuit Judges Taft and Lurton, *whose decision was unanimous.*

It will be "passing strange" if all these gifted and trained intellects, viewing the matter from a strictly impartial and judicial standpoint, should be so radically wrong in their conclusions, as the argument of counsel for the carriers necessarily implies.

In discussing this order, the circuit court (Judge Severens) says:

"This order is a just and reasonable one, and as near to the court's sense of the justice of the case as any the court could devise."

TO RAISE A MERE DOUBT OF THE LEGALITY OF THE ORDER NOT SUFFICIENT.

The Commission has made out a *prima facie* case by showing the issuance of its order and its violation, and the burden is thereby shifted to the defendants to show

clearly to the satisfaction of the court that the order is unlawful and should not be enforced. *To raise a mere doubt will not be sufficient.* In the case of Missouri Pacific Railway Comyany *v.* Texas and Pacific Railway Company (31 Fed. Rep., 862), Judge Pardee says:

"*Where the matter is not clear*" (that is, where it is not clear that the carrier is justified in a departure from the rule of the fourth section of the law) "*the object and policy of the law should prevail.*"

In *Interstate Commerce Commission* v. *The Louisville & Nashville R. R. Co. et al.*, in which rates from New Orleans to La Grange, the shorter distance point, and to Atlanta, the longer distance point, were involved, the United States circuit court for the southern district of Alabama (Judge Toulmin) says:

"The court is not so clear as to the proposition that the rates from New Orleans to La Grange are unreasonable and unjust in themselves and relatively so as compared with the rates to Atlanta * * * . But the findings of fact in the report of the Commission are made by law *prima facie* evidence of the matters therein stated, and the conclusions of the Commission based upon such findings are presumed to be well founded and correct, *and they will not be set aside unless error clearly appears.* The record does not clearly show that the Commission's findings and conclusions on this branch of the case are erroneous—are not in accordance with the law and the evidence—and the court should not overrule or in any other manner interfere with them."

(Fed. Rep.)

Chapter XVII.

THE CHARGE THAT THE RATES TO CHATTANOOGA ARE EXCESSIVE IN VIOLATION OF SECTION 1.

COMPETITION CAN NOT JUSTIFY EXCESSIVE RATES.

EXCESSIVENESS OF CHATTANOOGA RATES INFERRED FROM REASONABLENESS OF THE LOWER RATES FOR FOR THE LONGER HAUL TO NASHVILLE AND SHOWN IN MANY OTHER WAYS.

As we have stated at the outset, it is not only charged that the rates of the defendants to Chattanooga and Nashville are in violation of sections 3 and 4 of the law, but also that the rates to Chattanooga are excessive and therefore in violation of section 1.

The defendants traverse the charge that their rates to Chattanooga are excessive. They do not plead competition in answer to that charge. It is conceded by counsel for carriers that competition can not justify rates which violate the provision of section 1 of the law, requiring all rate charges to be just and reasonable in themselves.

In the "Alabama Midland Case" (168 U.S., 144), this court holds that competition may be set up as a defense

under sections 3 and 4 of the law, but neither this court, nor any other court, has held that competition may, while justifying discriminations under sections 3 and 4, indirectly set aside the fundamental provision of section 1, that all rate charges shall be just and reasonable.

In the "Behlmer case," decided at the present term, this court holds:

"That whilst the carrier may take into consideration the existence of competition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles: *First. The absolute command of the statute that all rates shall be just and reasonable.*" * * *

EXCESSIVENESS OF CHATTANOOGA RATES INFERRED FROM REASONABLENESS OF LOWER RATES FOR LONGER HAULS THROUGH CHATTANOOGA TO NASHVILLE.

In the first place, it would appear, presumptively at least, that the rates from eastern seaboard cities to Chattanooga are unreasonably high in themselves, or excessive, *because traffic is, and for a long series of years has been, carried through Chattanooga and 151 miles farther on to Nashville and 310 miles farther on to Memphis at materially lower rates.*

NASHVILLE RATES PRESUMED TO BE REASONABLE.

The *prima facie* presumption is that these materially lower rates for the materially longer haul to

Nashville yield the carrier a reasonable remuneration over and above the expense of carriage.

This presumption belongs to the same class of presumptions as the presumption of *sanity*. An individual who would render services for a sum not reasonably remunerative—and that, too, not "incidentally, but for a long series of years"—would be held to be an incompetent business man, if not *non compos mentis*. There is no reason why the same rule should not be applied to carriers.

On this point Judge Severens says in his opinion in this case:

"*The charges accepted for the longer haul may be referred to for the purpose of considering the reasonableness of the charges made for the shorter haul. Such comparisons are applied to every other kind of business, and the fact that there may be competition in such business would not be a controlling consideration, for the presumpiton would always be that the compensation charged for the services or thing is sufficient to be reasonable.*" (Record, p. 375.)

In this connection I quote as part of my argument the following extract from the opinion of the Commission:

"A strong presumption of its unreasonableness" (that is, unreasonableness of the Chattanooga rate) "is created by the voluntary action of the defendants themselves in seeking business at decidedly lower rates to points much more remote. When these carriers, for instance, charge 73 cents per hundred pounds on fourth-class freight

from New York to Chattanooga, and at the same time carry alike shipments 150 miles farther to Nashville for 42 cents a hundred, and *do this not incidentally but for a series of years, the belief that the higher rate is excessive becomes a positive conviction.* We are familiar with the argument by which the policy of lower rates to competitive points is defended, and concede its conclusiveness in certain cases and within certain limits; but *when the disparity between long and short distance charges reaches the proportions here exhibited* the inference is irresistible that the lesser rate must be unremunerative upon any theory, or else the larger rate gives an unwarranted return for the services rendered. As the Commission has said in another case, where a similar question was considered: 'The difference between the figures is too great to permit the lower charge to be justified by the rule of expediency without condemning the higher charge by the rule of reasonable compensation.'" (Record, p. 54.)

If, as we are bound to presume, the materially lower rates for a longer haul by 151 miles to Nashville yield the carriers a reasonable remuneration in excess of the cost of service, then the *same* rates to Chattanooga would yield a remuneration in excess of such reasonable remuneration, and rates to Chattanooga which are *materially higher* than rates to Nashville would yield a still greater remuneration in excess of such reasonable remuneration, and are presumptively excessive.

If, on the other hand, as all the witnesses for the carriers testify, the rates to Chattanooga yield only a reasonable compensation in excess of the cost of the service of transportation to that point, and are not excessive,

then the lower rates to Nashville yield not only nothing for the additional haul of 151 miles to Nashville, but less than nothing.

NOT LEFT TO PRESUMPTION.

But we are not left to presumption as to the reasonableness in themselves of the Nashville rates. On cross-examination a number of eminent railroad officials, namely, Y. Vandenberg, traffic manager of the Louisville and Nashville Railroad Company; Joseph M. Brown, traffic manager of the Western and Atlantic Railroad; R. E. Lutz, freight traffic manager of the Atlanta and West Point Railroad and of the Western Railway of Alabama, testified that the Nashville rates were reasonable in and of themselves, and that a rate was not reasonable in and of itself unless it yielded, *not some*, but a reasonable or proper remuneration in excess of the cost of the service of transportation.

The following is an extract from the testimony of Y. Vandenberg (*Record, pp. 138, 139*):

Cross-question 62. "The haul from New York to Nashville is 151 miles longer than the haul to Chattanooga, is it not?"

Answer. "Yes, sir."

Cross-question 63. "Is the 91-cent rate to Nashville reasonable in and of itself?"

Answer. "I think so."

Cross-question 67. "Is a rate reasonable which does not yield the carrier a *proper remuneration over and above the cost of service?*"

Answer. "I do not believe carriers make rates below the cost of transportation. I would consider such a rate as unreasonably low."

Cross-question 68. "It would not then be a reasonable rate unless it yielded a *proper remuneration* over and above the cost of service?"

Answer. "It would be an unreasonably low rate."

(Record, pp. 138, 139.)

Joseph M. Brown, traffic manager of the Western and Atlantic Railroad, who has been connected with the railroad freight transportation business in the United States since 1877, testified that the rates to Nashville were reasonable "*in and of themselves*," and also that a rate is not reasonable in and of itself which does not yield the carrier a *proper* (*not some*) *remuneration* over and above the cost of service of carriage. The following is an extract from his testimony on cross-examination:

Cross-question 6. This question, after reciting the rates to Chattanooga and Nashville, respectively, concludes thus:

"Are those rates to Nashville reasonable in and of themselves, in your opinion?"

Answer. "Yes, sir."

Cross-question 9. "Is a rate reasonable in and of itself which does not yield the carrier a *proper remuneration* over and above the cost of service of carriage?"

Answer. "I should say not. If carried for less than cost, it would be unreasonably low."

(Record, p. 186.)

R. E. Lutz, freight traffic manager of the Atlanta and West Point Railroad and of the Western Railway of Alabama, who had been in the transportation business about 28 years, testified that the rates to Nashville were reasonable "*in and of themselves*," and that a rate is not reasonable in and of itself which does not yield the carrier a proper remuneration over and above the cost of service of the carriage. (Record, pp. 189, 190.)

One of the witnesses for the roads, T. S. Davant, general freight agent of the Norfolk and Western Railway Company, having testified on cross-examination that the rates to Nashville from eastern seaboard cities were, in his opinion, "unreasonably low," counsel for the carriers on redirect examination attempted to show this witness that he was mistaken, and succeeded in proving by him that the rates to Nashville were reasonably high and not unreasonably low. This appears from the following extracts from the testimony of this witness:

> Cross-question 4. "You state that the rates to Chattanooga are just and reasonable in themselves. Are the rates to Nashville also just and reasonable in themselves?"
>
> Answer. "In my opinion the rates from New York and Boston to Nashville are *unreasonably low*."
>
> (Record, pp. 153, 154).

On redirect examination counsel for the roads, with a view, as above stated, of showing this witness that he was mistaken in testifying that the rates to Nash-

ville were "unreasonably low," examined him as follows on this point:

Q. 1. "Are not the rates from New York to Nashville made by the trunk lines to Cincinnati and thence by the Louisville and Nashville Railroad to Nashville?"
A. "Yes, sir."
Q. 2. "Do you regard the trunk-line rates from New York to Cincinnati as unreasonably low?"
A. "No, sir."
Q. 3. "Are not the proportions which the Louisville and Nashville road received from Cincinnati to Nashville on freight from New York the same per ton per mile as the trunk-line rates from New York and Cincinnati?"
A. "I can not answer that question definitely, but it is my opinion that they are about on that basis."
Q. 4. "Then, if the trunk-line rates per ton per mile from New York to Cincinnati are not unreasonable, do you think that the Louisville and Nashville proportions from Cincinnati to Nashville are unreasonably low?"
A. "No, sir."
(Record, p. 155.)

Here is conclusive proof of the most convincing character, made by counsel for the roads, that the rates to Nashville are not "unreasonably low." A total rate made up of two rates, each of which is not unreasonably low, can not itself be unreasonably low.

The distance, moreover, by the shortest rail line via Cincinnati to Nashville is greater than via Chattanooga, the distance by the shortest line from New York via Cincinnati being 1,053 miles, and the distance by the shortest line via Chattanooga from New York being 999 miles.

(See testimony of J. M. Smith in answer to interrogatory 17, Record, pp. 234, 235.)

Counsel for carriers concedes, then, that the Nashville rates (even by the long line *via* Cincinnati) are not "unreasonably low," and his witnesses testify to the proposition, which is *self-evident* and needs no proof, that a rate is "unreasonably low" which does not yield the carrier a "*proper*" (not some) "remuneration in excess of the cost of service of carriage."

Counsel for carriers correctly deemed it necessary to prove that the Nashville rates are not "unreasonably low," because if they are THAT ALONE CONSTITUTES AN UNDUE PREFERENCE IN FAVOR OF NASHVILLE.

THE RATES COMPLAINED OF.

Below are given the rates to Chattanooga, Nashville, and Memphis *complained of before the Commission.* Those rates are the same now as in 1892, when the order of the Commission was made.

To—	First class.	Second class.	Third class.	Fourth class.	Fifth class.	Sixth class.
Chattanooga	$1.14	$0.98	$0.86	$0.73	$0.60	$0.49
Nashville (151 miles farther on)	.91	.78	.60	.42	.36	.31
Memphis (310 miles beyond Chattanooga)	1.00	.85	.65	.45	.38	.35

Excess of rates per 100 pounds to Chattanooga over Nashville rates:

Classes:	1	2	3	4	5	6
	23 cts.	20 cts.	26 cts.	31 cts.	24 cts.	18 cts.

Excess of rates per minimum carload of 24,000 pounds to Chattanooga.

The Southern Freight Classification, under which these rates are established, provides for a minimum carload weight of 24,000 pounds. On this minimum carload weight of 24,000 pounds the rates to Nashville and Chattanooga, and the excess of the Chattanooga rates over the Nashville rates, are as follows:

Classes.	To Nashville.	To Chattanooga.	Excess of Chattanooga rate over Nashville.
1	$218.40	$273.60	$55.20
2	187.20	235.20	48.00
3	144.00	206.40	62.40
4	100.80	175.20	74.40
5	86.40	144.00	57.60
6	74.40	117.60	43.20

(See testimony of Jesse M. Smith, answer to interrogatory 12. (Record, pp. 231, 232.)

Judge Severens forcibly illustrates the great disparity between the Chattanooga and Nashville rate, as follows (Record, p. 371):

"It appears that, comparing the rates to Chattanooga and Nashville, although the distance to Chattanooga is

151 miles less than to Nashville, the charge on first-class freight to the former place is 25 per cent higher than to the latter; on second class it is 26 per cent higher; on third class it is 43 per cent higher; on fourth class it is 74 per cent higher; on fifth class it is 67 per cent higher, and on sixth-class 58 per cent. If the charges are reckoned by mileage, they are about 100 per cent higher on freight of the three lower classes from New York to Chattanooga than they are to Nashville, and over 67 per cent higher in the aggregate of rates for all the classes."

When these figures are considered we can not but agree with the Commission that, "*when the disparity between long and short distance charges reaches the proportions here exhibited, the inference is irresistible that the lesser rate must be unremunerative upon any theory, or else the larger rate gives an unwarranted return for the services rendered.*"

DISTANCE OR THE LENGTH OF THE HAUL AS IT AFFECTS THE REASONABLENESS OF RATES.

The length of the haul has a material bearing upon the reasonableness of rates, because the cost of the service of carriage depends largely, if not principally, on the length of the haul.

All the witnesses for the carriers admit that, other things being equal, the consumption of time is greater the greater the length of the haul;

That, other things being equal, the consumption of fuel is greater the greater the length of the haul;

That, other things being equal, the wear and tear on locomotives, cars, track, roadbed, etc., is greater the greater the length of the haul;

That, other things being equal, the cost of keeping a road in repair is greater the greater the length of the road;

That, other things being equal, it requires more locomotives and cars and more crews for the running of trains on a long road than on a short one;

That, other things being equal, distance adds to the cost of building roads, and therefore the fixed charges, such as interest on capital invested, taxes, etc., are greater the greater the length of the road; and

That the value of the service to the shipper, as a general rule, is greater the greater the length of the haul.

It is thus seen that not only the expense of the actual service of transportation, but ALSO THE FIXED CHARGES, such as interest on investment, etc., are directly dependent on distance. These expenses and charges are necessarily first to be determined in making a reasonable rate. Distance, therefore, is the most important and a controlling element in rate making.

The haul to Nashville being 151 miles longer than the haul to Chattanooga, the expense of the haul to Nashville must be to that extent greater than to Chattanooga,

and if, as witnesses for the road testify and as we are bound to infer in the absence of such positive testimony, the rates to Nashville pay the expense of the haul to Nashville and a *reasonable or proper remuneration* above that expense, then the materially higher rates to Chattanooga yield a remuneration very much greater than a reasonable remuneration in excess of the cost of transportation to Chattanooga, and are unquestionably excessive.

COMPARISON OF RATES PER TON PER MILE TO CHATTANOOGA WITH THE AVERAGE RECEIPTS PER TON PER MILE AND ESTIMATED COST PER TON PER MILE ON TRAFFIC IN GENERAL ON LINES OF THE DEFENDANTS AND OF CARRIERS ALL OVER THE COUNTRY.

The excessiveness of the Chattanooga rates is further indicated by a comparison of the rate per ton per mile yielded by those rates with the average receipts per ton per mile and estimated cost of carrying a ton a mile on lines of the defendants and on railroads throughout the country.

The rates *per ton per mile* on the six numbered classes for the haul of 848 miles from New York to Chattanooga are shown in the table below in cents and fractions of a cent.

Rates per ton per mile to Chattanooga.

Classes.	To Chattanooga.
	Cents.
1.....	2.68
2.....	2.31
3.....	2.02
4.....	1.72
5.....	1.41
6.....	1.15

Average of rates per ton per mile to Chattanooga, 1.88 cents.

The average receipts per ton per mile and the estimated cost of carrying 1 ton 1 mile for the year 1892 (when the order of the Commission was made), on roads in different sections of the country (embracing most of the defendants in this case), reported by these roads to the Interstate Commerce Commission, are shown in the table below (Record, p. 257).

Name of road.	1892.	
	Average receipts per ton per mile.	Estimated cost of carrying 1 ton 1 mile.
I.	*Cents.*	*Cents.*
1. Louisville and Nashville R. R	0.948	0.621
2. Nashville, Chattanooga and St. Louis Rwy	1.035	.599
3. Cincinnati, New Orleans and Texas Pacific Rwy	.779	.571

Name of road.	1892.	
	Average receipts per ton per mile.	Estimated cost of carrying 1 ton 1 mile.
II.	*Cents.*	*Cents.*
1. Pennsylvania R. R	.647	.448
2. New York, New Haven and Hartford R. R	1.747	1.425
3. Pittsburgh, Cincinnati, Chicago and St. Louis Rwy	.706	.551
4. Fitchburg R. R	.925	.712
5. West Shore R. R.[1]		
6. Lake Shore and Michigan Southern Rwy	.602	.416
7. Cleveland, Cincinnati, Chicago and St. Louis Rwy	.710	.481
8. New York, Chicago and St. Louis R. R.	.537	.438
9. New York Central and Hudson River R. R	.699	.518
10. Cumberland Valley R. R	1.285	1.058
11. New York, Philadelphia and Norfolk R. R	1.098	.885
III.		
1. East Tennessee, Virginia and Georgia Rwy	0.874	0.675
2. Norfolk and Western R. R	.545	.362
3. Richmond and Danville R. R	1.355	.929
4. Western and Atlantic R. R.[2]		

[1] Financial report filed. Operations included in those of New York Central and Hudson River R. R.

[2] No report filed. Operations included in those of Nashville, Chattanooga and St. Louis Rwy.

Name of road.	1892. Average receipts per ton per mile.	1892. Estimated cost of carrying 1 ton 1 mile.
	Cents.	*Cents.*
5. Central R. R. and Banking Co. of Georgia	1.356	.972
6. Georgia R. R. and Banking Co.[1]	.....	.....
7. Atlanta and West Point R. R	1.630	.931
8. Southern Rwy	.....	.....
9. Western Rwy. of Alabama	1.690	1.077

[1] Financial report filed. Operations included in those of Georgia R. R.

The average receipts per ton per mile and estimated cost of carrying 1 ton 1 mile, as shown in the above table, are on traffic in general—that is, on all classes of traffic.

Comparison will therefore be made of the figures in the above table with the average of the rates per ton per mile to Chattanooga on traffic in general—that is, on the six classes, which average is 1.88 cents.

This average of the rates per ton per mile to Chattanooga—1.88 cents—it will be seen, is *higher than the average receipts, etc., on all the roads named in the chart.*

It is more than *twice* as large as the average receipts per ton per mile on the following roads:

Cincinnati, New Orleans and Texas Pacific Railway.
Pennsylvania Railroad.
Pittsburg, Cincinnati, Chicago and St. Louis Railway.

West Shore Railroad.
Cleveland, Cincinnati, Chicago and St. Louis Railway.
New York, Chicago and St. Louis Railroad.
New York Central and Hudson River Railroad.
East Tennessee, Virginia and Georgia Railway.
Norfolk and Western Railroad.

It is more than *three* times as high as the average receipts per ton per mile on the following roads:

New York, Chicago and St. Louis Railroad.
Norfolk and Western Railroad.

It is from two to four times as high as the estimated cost of carrying 1 ton 1 mile on the following roads:

Louisville and Nashville Railroad.
Nashville, Chattanooga and St. Louis Railway.
Cincinnati, New Orleans and Texas Pacific Railway.
Pennsylvania Railroad.
Pittsburg, Cincinnati, Chicago and St. Louis Railway.
Fitchburg Railroad.
West Shore Railroad.
Lake Shore and Michigan Southern Railway.
Cleveland, Cincinnati, Chicago and St. Louis Railway.
New York, Chicago and St. Louis Railroad.
New York Central and Hudson River Railroad.
New York, Philadelphia and Norfolk Railroad.
East Tennessee, Virginia and Georgia Railway.
Norfolk and Western Railroad.

The average of the rates per ton per mile on the six classes to *Nashville* is 1.12 cents. The average of the rates to Nashville is greater, it will be seen, than the average receipts per ton per mile on the following roads:

Louisville and Nashville Railroad.
Nashville, Chattanooga and St. Louis Railway.

Cincinnati, New Orleans and Texas Pacific Railway.
Pennsylvania Railroad.
Pittsburg, Cincinnati, Chicago and St. Louis Railway.
Fitchburg Railroad.
Lake Shore and Michigan Southern Railway.
Cleveland, Cincinnati, Chicago and St. Louis Railway.
New York, Chicago and St. Louis Railroad.
New York Central and Hudson River Railroad.
New York, Philadelphia and Norfolk Railroad.
East Tennessee, Virginia and Georgia Railway.
Norfolk and Western Railroad.
Western and Atlantic Railroad.

The average of these rates per ton per mile to Nashville, it also appears, is about *twice* as high as the average receipts per ton per mile on the following roads:

Pennsylvania Railroad.
Pittsburg, Cincinnati, Chicago and St. Louis Railway.
Cleveland, Cincinnati, Chicago and St. Louis Railway.
New York Central and Hudson River Railroad.

And it is *more than twice* as large as the average receipts per ton per mile on the following roads:

New York, Chicago and St. Louis Railroad.
Norfolk and Western Railroad.

It will also be seen that it is *more than twice* the amount of the estimated cost of carrying one ton one mile on nearly *all the roads* in the table.

Section 20 of the act to regulate commerce requires carriers to make annual reports to the Interstate Commerce Commission, and among other items embraced in those reports are the average receipts per ton per mile

on traffic in general, and, up to the year 1894, the estimated cost of carrying one ton one mile. The figures in the above table, showing average receipts per ton per mile and estimated cost of carrying one ton one mile, are taken from the reports of the carriers made under the law to the Interstate Commerce Commission.

Counsel for the carriers, *appreciating the force of these figures*, attempted to show that this data is of no value in determining whether rates are or are not *excessive*, and with that view asked the witness J. M. Culp whether "the average receipts per ton per mile or the estimated cost of carrying 1 ton 1 mile, either jointly or separately, can be used as *the standard for railroad rate making*." The witness replied, "It can not, and is not." On cross-examination this witness testified as follows:

Recross-question 3. "Is not such data useful to some extent in determining whether an existing rate is or is not excessive?"

Answer. "It is useful in determining whether *all the rates* are excessive. In other words, the average receipts of a road per ton per mile might be so much that, taken in connection with other things, it might be held that the rates were excessive." (Record, p. 170.)

The witness testifies that such data is useful in determining whether "*all the rates* are excessive," and it *is to be noted that the question in the present case is whether the rates on all the six classes to Chattanooga are or are not excessive.*

This witness further testified that while the cost per ton per mile is estimated and is difficult to arrive at, the average receipts per ton per mile are easily ascertained and are the result of accurate calculation. *It further appears that this data is kept by roads for their own use and published in their own annual reports.*

While counsel for the roads attempts to discredit the usefulness of this data in shedding light upon the reasonableness or excessiveness of rates, yet he himself, with a view of showing that the proportions of the through rates to Nashville received by the Norfolk and Western Railroad, the East Tennessee, Virginia and Georgia Railway Company, the Western and Atlantic Railroad, the Central of Georgia Railway, and the Nashville, Chattanooga and St. Louis Railway were remunerative, introduces evidence that those proportions exceeded the "*estimated*" average cost per ton per mile on said roads, respectively, in 1892.

(See answer of T. S. Davant to interrogatory 9, Record, p. 151.)

This is a recognition, a practical admission by counsel for the carriers, that it is possible to ascertain the cost of carrying a ton a mile, and that this data is useful in determining whether rates are remunerative, and hence in determining their reasonableness.

In a brief filed in the circuit court counsel for the carriers virtually admits that this data is valuable as shedding light upon the question of the excessiveness of rates. He says:

"I used the *same data* to show that certain proportions of through rates to Nashville which are received by certain of the defendant carriers are "'REMUNERATIVE.'"

By the word "remunerative" counsel explains that he means "*any* remuneration over the additional cost of the movement of that particular traffic."

If this data is useful as showing whether rates yield *any* remuneration above the cost of service, does it not follow that it may also shed light upon the question as to whether or not the remuneration is excessive?

Counsel for the roads, in attempting to discredit this data, is confronted by the fact that it has been kept and recorded by the roads for their own use for a period long anterior to the passage of the act to regulate commerce, and is still so kept and recorded.

The question is, Why have they put themselves to this trouble, and of what use is this data to them?

Unquestionably for the very purpose for which it is being used in these cases—namely, to enable them to see whether their rates are too high or too low.

The argument of counsel for the carriers *goes too far.*

If his position in reference to this data is correct, it is of no value whatever for any purpose, and the carriers are *stultifying* themselves in making it out and keeping record of it.

We do not contend that these data indicate with mathematical accuracy what is a reasonable rate in a given case, but that the fact that rates yield rates per ton per mile *many times higher* than the average receipts per ton per mile of roads in general (embracing most of the defendants) is a circumstance, in connection with others, showing, or tending to show, that those rates are excessive.

The *receipts* are, of course, the result or outcome of the rates and may be, therefore, said to be an *index* to the rates.

OTHER THINGS BEING EQUAL, AS THE RATES ADVANCE THE RECEIPTS WILL INCREASE.

Chapter XVIII.

A PRIMA FACIE CASE OF EXCESSIVENESS OF CHATTANOOGA RATES MADE OUT.

All these matters to which we have referred in the preceding chapter make out, as we claim, a *prima facie* case of excessiveness in rates, and are sufficient to shift the burden of proof to the defendants.

NATURE OF TESTIMONY OFFERED BY CARRIERS TO SHOW REASONABLENESS OF CHATTANOOGA RATES.

As we have seen, the reasonableness in themselves of the Chattanooga rates was distinctly in issue before the Commission, and is in issue under the pleadings in the case before the court. The defendants, realizing that the burden is upon them, have introduced testimony to show the reasonableness of the Chattanooga rates.

The following testimony of J. M. Culp is a specimen of the proof introduced by counsel for the carriers to show the reasonableness of the Chattanooga rates. He asks:

Question 17. "State whether in your opinion the rates from New York and Boston to Chattanooga were just

or unjust, reasonable or unreasonable, and give your reasons for any opinion you may express."

Answer. "They were, in my *opinion*, certainly not unreasonably high. They were reasonably low. My reasons for this opinion are that *the property moved freely on these rates;* business was done and had been done under these rates at a profit; they were *lower than the property could be shipped between the same points by any other means of transportation;* and they were in line with the rates to Knoxville, Rome, Atlanta, and Dalton, and other points doing business in competition with this point." (Record, p. 159.)

(*a*) The first reason given is that the Chattanooga rates are reasonable because *traffic is moved under them.*

This is equivalent to saying that any rate is reasonable which is not *prohibitory.* A rate under which traffic will *not* move is prohibitory and "kills the goose that lays the golden egg."

There is a wide margin, manifestly, between a prohibitory rate and a reasonable rate. For example, *traffic may be worth, say, $100. The rate charged may be $90. In order to secure the $10 difference between the rate and the market value of the traffic, the shipper will ship under the $90 rate, although a reasonable rate might be only $50, or less.*

The alternative presented to the shipper is *something or nothing, "a half loaf or no loaf at all."* Therefore the traffic will move under excessive rates.

(*b*) The second reason given is that the Chattanooga rates are reasonable because "they are lower than the

property could be shipped between the same points *by any other means of transportation.*"

The other "means of transportation" referred to, it appeared on cross-examination, were WAGONS, CARTS, etc. *The inference sought to be drawn is that the Chattanooga rates, being less per ton per mile than wagon and cart rates for short hauls, are, therefore, not unreasonably high.*

It is difficult to realize that this *wagon or ox-cart argument* can be seriously insisted upon.

Comparison of a rail rate with a wagon or cart rate for the purpose of showing the reasonableness of the former is wholly valueless, for the following among other reasons:

1. Where a wagon or cart carries one ton of freight, a railroad carries thousands.

2. Where a wagon or cart carries freight one mile, a railroad carries it hundreds or thousands of miles.

3. Wagons and carts have no monopoly of transportation over a particular roadway.

When railways came into operation, however, they superseded other modes of transportation and obtained a practical monopoly as to hauls of any length. They have an absolute monopoly over their own roadbeds, whereas public highways for vehicles are free to all. It is this monopoly which, both in England and this coun-

try, has called for legislation regulating their rate charges. In the case of the Attorney-General *v.* B. & D. J. Ry. Co. (2 Eng. Railway and Canal Cases, pp. 132, 133) the Lord Chancellor said that the object of Parliament in its several enactments for the regulation of railways and their charges was to prevent "those who should get the monopoly of the carriage of the public from exercising that monopoly to the prejudice of individuals." Our act protects *localities* as well as individuals. (Sections 3 and 4, act to regulate commerce.)

4. Railroads operate under charters derived from the public granting them rights of way and other exclusive franchises, and hence, as said by Justice Brown in Union Pacific Company *v.* Goodridge (149 U. S., 680), are "*bound to deal fairly with the public, upon whose will they are dependent for their corporate existence.*"

There is no analogy whatever between transportation by rail and transportation in wagons and carts. The circumstances and conditions in the two cases are substantially dissimilar.

(*c*) The third reason given is that the Chattanooga rates are reasonable, because they are in line with the rates to Knoxville, Rome, etc.

What the rates to Knoxville, Rome, etc., are is not stated, and there is no proof whatever as to the reasonableness of those rates. This third reason can not be

held to be satisfactory, or, indeed, any ground for pronouncing the Chattanooga rates REASONABLE IN THEMSELVES.

This is the nature of the so-called proof offered by counsel for the carriers to show the reasonableness in themselves of the Chattanooga rates. *He does not make proof of the facts laid down by the courts as competent to prove the reasonableness of rates, although the knowledge of those facts is peculiarly in the possession of his witnesses, railroad officials.*

He yet strenuously insists that the Commission should make proof of those facts.

OPINIONS OF RAILROAD OFFICIALS.

Counsel for carriers relies mainly on mere *opinions* of railroad officials as showing the reasonableness of the Chattanooga rates.

These witnesses are the very men who have made and are responsible for the rates to Chattanooga. They are naturally strongly biased in favor of their own action, and *when they give their* OPINIONS *as to the reasonableness of these rates and as to other matters involved in these cases, those* OPINIONS *are to be viewed and weighed in the light of the fact that they are the opinions of interested parties, naturally strongly biased.*

It is claimed that railway traffic managers are experts, and that therefore their mere opinions are

competent evidence of the reasonableness of rates, although that is the very matter in issue for the courts and the Commission to determine.

In this connection we again quote as a part of our argument the following extract from the opinion of the circuit court of appeals in this case:

"It has been suggested that traffic managers are much better able, by reason of their knowledge and experience, to fix rates and to decide what discriminations are justified by the circumstances than courts. This can not be conceded so far as it relates to the Interstate Commerce Commission, which, by reason of the experience of its members in this kind of controversy and their great opportunity for full information, is, in a sense, an expert tribunal; but it is true of the Federal courts. Nevertheless, courts are continually called upon to review the work of experts in all branches of business and science, and the intention of Congress that they should revise the work of railway traffic experts, whether railway managers or commerce commissioners, is too clear to admit of dispute." (Record, p. 415.)

Not only is the Interstate Commerce Commission "by reason of the experience of its members in this kind of controversy and their great opportunity for full information an expert tribunal," but it has decidedly the advantage of railway traffic managers in that *it is an unbiased, impartial tribunal.*

Chapter XIX.

BURDEN OF PROOF.

UNDER SECTION 4:

Where rates to shorter distance points are higher than to longer distance points the burden of proof is upon the carriers to show "a substantial dissimilarity of circumstances and conditions" justifying such higher rates. This is admitted by counsel for carriers.

UNDER SECTION 3:

The same is true where rates to different localities are shown under section 3 to be relatively unequal.

Departures from the long and short haul rule of section 4 are only a species of discrimination between localities, which are embraced in and would have been unlawful under section 3, although not specifically denounced in section 4. As said by Judge Severens in the opinion of the circuit court in this case:

"The long and short haul clause of section 4 is only one of the *specific* provisions employed for the general purpose of the act. The third section underlies the fourth and supplies the principles on which it rests."

UNDER SECTION 1:

Counsel for carriers insists that where rates are charged to be excessive in themselves, and hence in

violation of section 1, the burden of proof is upon the party making the charge.

Conceding that to be so where the charge is under section 1 alone, and there are no charges under sections 3 and 4, *we claim that the burden of proof has been shifted in these cases.*

The facts in evidence and relied upon by the Commission raise at least a *strong presumption* of the excessiveness of the rates to Chattanooga. (See Chapter XVII, *supra.*)

This presumption is sufficient to shift the burden of proof to the defendants.

In Wharton's Law of Evidence (sec. 367, 3d ed.) it is said "that where a creditor shows facts that raise a *strong presumption* of fraud in a conveyance made by his debtor, the history of which is necessarily known to the debtor only, the burden of proof lies on the debtor to explain it."

WHERE THERE ARE CHARGES UNDER SECTIONS 3 AND 4,

The excessiveness of the rates to the shorter-distance points is *material or relevant* to the issue presented by such charges.

If, for instance, the rates to one locality are excessive and to the other reasonable, this alone would constitute an undue preference in rates.

The *disparity* between the rates to two localities being shown, the burden is shifted to the carrier to justify its rates: and hence, in that case, it is incumbent upon the carrier to *show affirmatively the reasonableness of the rates to the points discriminated against.* It is involved in the issue.

Counsel for the carriers appears to *have realized* and *has practically admitted* the truth of this proposition by attempting to prove by all his witnesses, on direct examination, that the rates to Chattanooga are reasonable.

The Commission laid down the correct rule as to burden of proof in the case of McMorran *v.* Grand Trunk Railway of Canada (3 I. C. C. R., p. 261), as follows:

"When a rate is *prima facie* disproportionate or relatively unequal, the *onus* is on the carrier to justify its charges when challenged on these grounds. *The knowledge of the justifying circumstances and conditions relied on is peculiarly in the possession of the carrier.*"

In that case the Commission further says in this connection:

"The evidence does not show with any precision what these several expenses" (terminal expenses) "are, either in the aggregate or what would be a fair distribution of them per carload or per hundred pounds of freight. The defendants assume in their brief that the *burden* of showing these expenses was upon the petitioner; but this assumption is altogether erroneous. It would impose on persons conceiving themselves aggrieved by

carriers *a difficult and onerous rule of evidence.* It would be impossible for the petitioners to show such facts otherwise than by the *defendants' agents*, and it was clearly the province of the defendants to make them appear."

The rule that the burden is on a party to prove what is peculiarly in his knowledge, whether the proposition be affirmative or negative, is elementary law, and is laid down by all text writers on the subject.

Section 367, 3d ed., Wharton on "Law of Evidence."

Section 79, 15th ed., "Greenleaf on Evidence."

CONTENTION OF COUNSEL FOR CARRIERS THAT COMMISSION SHOULD MAKE PROOF OF THE MATTERS MENTIONED BY THIS COURT IN SMYTHE V. AMES AND OTHER CASES.

We have shown in the preceding chapter, XVIII, of this argument that counsel for carriers has assumed the burden of proof as to the reasonableness of the Chattanooga rates, and we *have shown the wholly unsatisfactory character of the proof he has introduced.*

While such is the character of the proof introduced in behalf of the carriers, it is yet, as stated in the preceding chapter, insisted that the Commission should make proof of the "cost of construction of the roads, the amount expended in permanent improvements, the amount and market value of their bonds and stocks,"

and other matters mentioned by this court in the case of Smythe *v.* Ames (169 U. S., 466), the Covington and Lexington Turnpike Company (164 U. S., 578), and other cases, as proper to be considered in determining the reasonableness of rates.

1. In the first place, if, as we contend, the burden of proof is upon the carriers, it was incumbent upon them to make proof of this character.

2. In the second place, these are matters peculiarly in the knowledge of the carriers, and, under the well-settled rule above stated, the burden was upon them to make proof of these matters.

3. In the third place, in the cases of the Joint Traffic Association, Smythe *v.* Ames, and the other cases, *there were involved entire systems of rates* and not rates to a particular locality.

Where *entire systems* of rates are in question, the cost of construction of roads and a reasonable return on such entire cost may shed light upon the reasonableness of an entire system of rates, but *where the reasonableness of the rates to one locality alone are involved such proof can be of little value.*

The rates to one locality may be grossly excessive and yet the entire system of rates may be unremunerative because of rates too low to other localities.

PUBLIC ENTITLED TO RATE NOT IN EXCESS OF REASONABLE WORTH OF SERVICE RENDERED.

It is to be noted that in Smythe *v.* Ames this court qualifies or limits its ruling, that the carrier is entitled to "a fair return upon the value of the property which it employs for the public convenience" by the statement that the "*public is entitled to demand rates not in excess of what the service rendered is reasonably worth.*"

These two propositions are to be taken together.

The right of the public, and every portion of the public, to reasonable rates is always to be considered as well as the revenue of the carrier. This proposition is laid down and enforced by this court in the case of Covington and Lexington Turnpike Company *v.* Sanford et al. (164 U. S., p. 578). In that case Mr. Justice Harlan, in delivering the opinion of this court, said:

"The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just to the public. * * * The public can not properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. * * * So that the right of the public to use the plaintiffs' turnpike upon payment of such tolls *as in view of the nature and value of the services rendered by the company are reasonable* is an element in the general inquiry whether the rates established by law are unjust and unreasonable."

CHAPTER XX.

NASHVILLE IS NO MORE IN TRUNK-LINE TERRITORY THAN IS CHATTANOOGA.—EXPENSIVE SOUTHERN TRANSPORTATION SHOULD AFFECT RATES TO NASHVILLE AS WELL AS TO CHATTANOOGA.

Counsel for the carriers argues this case upon the idea that Nashville is in the trunk-line territory, while Chattanooga is not. The truth is Nashville is no more in trunk-line territory than is Chattanooga. Trunk-line territory terminates on the south at the Ohio River points—Cincinnati, Louisville, and Evansville.

The length of the haul by the Louisville and Nashville line from Cincinnati *through expensive southern territory* to Nashville is only 40 miles less than from Cincinnati, via the Cincinnati, New Orleans and Texas Pacific Railway, to Chattanooga.

The route through Chattanooga, over which "*the vast majority*" (Record, p. 126) of the Nashville traffic passes to Nashville, is *through expensive southern territory* from Hagerstown, Bristol, Alexandria, or Norfolk, or from the South Atlantic ports—Charleston, Savannah, etc.—and, as we have seen, *the haul through this southern territory by these routes is 151 miles longer to Nashville than to Chattanooga.*

C A N A D
WASHINGTON
OREGON
MONTANA
NORTH DAKOTA
LAKE SUPERI
VII
WYOMING
SOUTH DAKOTA
WISCONSIN
VI
NEBRASKA
IOWA
ILLINOIS
X
NEVADA
UTAH
COLORADO
KANSAS
MISSOURI
VIII
INDIAN TERRITORY
ARKANSAS
ARIZONA
NEW MEXICO
TEXAS
IX
LOWER CALIFORNIA
GULF OF CALIFORNIA
TERRITORIAL GROUPS
ADOPTE
INTERSTATE COM
STATISTIC
FOR
COMPILATION OF
Scales
Miles
Kilometers

TERRITORIAL GROUPS OF THE UNITED STATES
ADOPTED BY THE
INTERSTATE COMMERCE COMMISSION
STATISTICIANS OFFICE
FOR THE
COMPILATION OF RAILWAY STATISTICS

Scales

Counsel for the carriers calls the attention of the court with great earnestness to the well known fact that rates are higher in what is known as southern territory than in trunk-line territory and in the East. In order to impress that fact upon the mind of the court he exhibited certain charts illustrating the difference between "earnings from freight service," "earnings from passenger service," "density of passenger traffic," "density of freight traffic," and "capital upon which dividends are paid," on railways in certain territorial groups adopted by the Interstate Commerce Commission for the compilation of railway statistics.

Argument for Carriers pp 75-82

Annexed is a map showing these territorial groups.

The diagrams presented to the court by counsel for the carriers relate to Groups II, III, IV, and V. It will be seen that Groups IV and V embrace the territory known as southern territory, to wit, territory east of the Mississippi and south of the Ohio and Potomac rivers; and that Groups II and III embrace trunk-line and eastern territory, or territory east of the Mississippi and north of the Ohio and Potomac rivers.

From an examination of this map it will be seen that traffic from Boston, New York, Philadelphia, and Baltimore, in Eastern territory (Group II), which goes to Nashville by the route via Chattanooga *passes for the most part through Southern territory* (Groups IV and

V). If such traffic goes by ocean to the South Atlantic ports—Charleston, Savannah, etc.—*the entire rail transportation is through Southern territory to Nashville.* If it goes by the all-rail lines, *nine-tenths or a larger proportion of the haul to Nashville is through Southern territory.*

When it goes by either the all-rail or the ocean and rail routes, it passes through Chattanooga to Nashville, and there is consequently 151 miles longer haul through this *expensive* Southern territory to Nashville than to Chattanooga, and the uncontradicted testimony before the court (Record, p. 126) is that the "vast majority" of the Nashville traffic goes by that route.

The small portion of the Nashville traffic which goes by the Cincinnati route enters Southern territory at Cincinnati and passes through Southern territory on to Nashville.

In view of these facts, it is difficult to see how the expensiveness of transportation through Southern territory justifies lower rates for the haul through Chattanooga to Nashville than to Chattanooga. *The expensiveness of Southern transportation should affect rates to Nashville to as great an extent as it affects rates to Chattanooga, if not to a greater extent.*

CHAPTER XXI.

THE PRESENT CASE STRONGER THAN EITHER THE "ALABAMA MIDLAND CASE" OR THE "SOCIAL CIRCLE CASE." THESE CASES DISTINGUISHED.

1. *The Alabama Midland case.*—The present case is distinguishable from the Alabama Midland case in *four material particulars.* In the latter case competition by the Alabama River from Montgomery to Mobile, as well as rail competition, was set up as justifying lower rates from Eastern seaboard cities to Montgomery, the longer distance point, than to Troy, the shorter distance point. The circuit court, the circuit court of appeals, and this court all recognized and cited in their respective opinions as material, if not controlling, facts in that case—

(*a*) That the Alabama River competition had reduced the rail rates "TO THE LEVEL OF THE LOWEST PRACTICAL PAYING WATER RATES."

(*b*) That the Alabama River was "OPEN ALL THE YEAR."

(*c*) That the Alabama River "was capable, if need be, of bearing to Mobile on the sea the burden of all

the goods of every class that passed through or from Montgomery."

(*d*) That there were "MANY MORE RAILWAY LINES running to and through Montgomery, connecting with all the distant markets, than ran through or to Troy."

In the opinion of this court in the Alabama Midland Case these four facts, as found by the courts below, are recited in quotations from the opinions of those courts, and *are thus recognized as material.* (Interstate Commerce Commission *v.* Alabama Midland Railway Co., 168 U. S., p. 171; 69 Fed. Rep., p. 227; 41 U. S., App., p. 453.)

The reverse situation exists in the present case.

(*a*) The so-called competition of the Cumberland River has not reduced the rail rates to "the level of the lowest practical paying water rate," but the RAIL RATES ARE ON AN AVERAGE MORE THAN THREE TIMES AS HIGH AS THE CUMBERLAND RIVER RATES.

(*b*) The Cumberland River is not "open all the year," but only about eight months in the year, and then only for "very light draft steamers."

(*c*) The Cumberland River is not capable of bearing to Nashville "the burden of all the goods of every class that pass to or from" Nashville. During four months of the year it is not navigable at all, and the balance of the time only navigable by "very light draft steamers."

(*d*) There are not "many more railways that run to and through" Nashville than run to and through Chattanooga, but, on the contrary, nine railways run to and through Chattanooga while only two run through and to Nashville.

This latter fact—that there were more lines of road actually reaching Montgomery than entered Troy—was commented upon with great stress by counsel for the roads *as justifying lower rates to Montgomery than to Troy.* No reason appears why this contention, if sound in the Alabama Midland Case, should not also be sound in the present case.

2. *Social Circle Case.*—In the Social Circle Case higher rates were charged from Cincinnati to Social Circle; the shorter distance point, than for the longer haul through Social Circle on to Augusta. The defense was water and rail competition at Augusta. This plea was found by the Commission to be not sustained, and an order issued that the rates to Social Circle should not be higher than those to Augusta. *The order of the Commission was affirmed by the circuit court of appeals and by the Supreme Court.* (162 U. S., p. 184.)

In the Social Circle Case no complaint was made by any merchant or citizen of Social Circle, and no injury to Social Circle was proven or alleged, and Social Circle was a small local, strictly noncompetitive station on the Georgia

Railroad. In these respects the present case is differentiated from, and is stronger than, the Social Circle Case. Complaint is made in behalf of Chattanooga by its Board of Trade; *positive injury to Chattanooga is proven by the testimony of her leading merchants, and Chattanooga is shown to be a competitive point as well as Nashville.*

CHAPTER XXII.

CONTENTION THAT THIS CASE SHOULD BE SENT BACK TO THE COMMISSION.

THIS LEFT TO THE DISCRETION OF THE COURTS. CONSIDERATIONS WHICH SHOULD CONTROL THIS DISCRETION IN THE PRESENT CASE.

DISTINCTIONS BETWEEN THE PRESENT CASE AND THE "BEHLMER CASE."

THE CASE IN COURT A PROCEEDING DE NOVO.

Counsel for the carriers contends that this case should be sent back to the Commission for reinvestigation or readjudication because of the error of the Commission in holding that it could not consider competition by carriers subject to the act to regulate commerce except under the proviso to the fourth section. In support of this contention he relies upon the decision of this court in Texas and Pacific Railway Co. *v.* Interstate Commerce Commission (162 U. S., 239), known as the "Import case"—in which, it is to be noted, *the case was not sent back to the Commission*—and upon the action of this court, *sending the case back to the Commission*, in the case of the Louisville and Nashville R. R. Co. *v.* Behl-

mer, decided at the present term, and known as the "Behlmer case." There are material distinctions, relating to this question, between the "Behlmer case" and the present case.

A MATTER OF DISCRETION WITH THE COURTS.

Before considering these distinctions attention is called to the fact that in the "Import case," one of the cases relied upon by counsel for carriers, this court held that it was within the *discretion* of the court in a case like the present to either determine the case itself or send it back to the Commission. The language of the court on this point is as follows:

"As the act provides that, on such hearing" (that is, a hearing by the court of a petition by the Commission for the enforcement of an order), "the findings of fact in the report of said Commission shall be *prima facie* evidence of the matters therein stated, we think it plain that if, in such a case, the Commission has failed in its proceedings to give notice to the alleged offender, or has *unduly restricted its inquiries* upon a mistaken view of the law, the court ought not to accept the findings of the Commission as a legal basis for its own action, but *should either inquire into the facts on its own account* or send the case back to the Commission to be lawfully proceeded in." (162 U. S., p. 239.)

The court, then, may, in cases of this character "*either inquire into the facts on its own account or send the case back to the Commission to be lawfully proceeded in.*"

CONSIDERATIONS WHICH SHOULD INFLUENCE THE COURTS IN THE EXERCISE OF THIS DISCRETION.

1. *The statute requires that these cases be determined "speedily."*

In the first place, we think that in the exercise of this discretion the courts should take into consideration, among other matters, the fact that the statute (section 16 of the act to regulate commerce) requires the courts to hear and determine these cases "*speedily as courts of equity.*" It has now been *ten years* since the complaint before the Commission from which this case originated was filed, and the case has been *seven years* in the courts. To now direct it to be begun anew before the Commission will well nigh amount to "*a denial of justice*," and it is manifest that such direction should not be given unless it be absolutely essential to the ends of justice. The mandate of the statute to the courts is "that they do *justice speedily.*" The two ideas, *justice and speed*, are interwoven in this enactment, because Congress recognized that delay in these cases would result in irremediable *injustice.*

2. *The controlling consideration should be whether injury which the courts can not remedy has been done the carriers by the error of the Commission.*

The consideration, however, which should control the court in determining how it shall exercise its dis-

cretion to "either inquire into the facts on its own account or send the case back to the Commission" should be, we think, whether any injury has been done the defendants by the error of the Commission which the courts can not remedy by adjudicating the matter themselves.

In this connection the distinction is to be noted between the "findings of fact" of the Commission and its conclusions. The findings of fact of the Commission are made by the statute "*prima facie* evidence before the courts of the matters therein stated;" there is no such provision as to the conclusions of the Commission.

It will be observed that in the passage from the opinion of this court in the "Import case," which we have read, it is held that if the Commission "*has unduly restricted its inquiries*" (that is, inquiries into the facts) "upon a mistaken view of the law, the court ought not to accept the findings" (that is, findings of fact) "of the Commission as a legal basis for its own action, but should either inquire into the facts on its own account or send the case back to the Commission to be lawfully proceeded in." The court does not hold that where the Commission has committed an error of law or an error in its conclusions from the facts the case should be sent back to the Commission. It is only where the Commission has "unduly restricted its inquiries" into the facts upon a mistaken view of the law that the case

may be sent back to the Commission, and *even then it is left discretionary with the court to pursue that course or to proceed to inquire into the facts on its own account.*

If it appears that the Commission has made full findings of fact, on all the matters in issue before it, but has made a mistake in its conclusions from those facts or as to the law applicable to those facts, then the courts can correct this error without injury to the carriers, and in such case it is the duty of the courts to determine the matter without sending the case back to the Commission, thus avoiding the vexatious delay and expense incident to the latter course.

The error of the Commission in this case was not in failing to find the facts fully as to competition and the other matters in issue before it, but was purely an error of law. The Commission held that it could not give weight to competition by carriers subject to the act except under the proviso to the fourth section, and this it has been since held by this court is an error but it is an error of law which it is peculiarly the function of the courts to correct.

This error of law can not be claimed or shown to have in any way or to the slightest extent influenced the Commission in its findings of fact. The Commission did not "unduly restrict its inquiry" into the facts, and it is contrary to the scheme of the statute that the courts should send a case back to the Commission for the correction of an error of law.

COMPETITION AN ISSUE BEFORE THE COMMISSION AND FACTS RELATING THERETO FULLY FOUND.

On an examination of the answers of the carriers to the complaint before the Commission it will be found that the gist of their defense, if not their sole defense, was competition, and all the testimony, both of the carriers and the complainant, before the Commission related to this defense. On an examination of the report and opinion of the Commission it will be found that there is a full, specific, and painstaking statement of all the facts in evidence bearing upon the issue raised by the plea of competition, whether the competition be by carriers subject to the act or by carriers not subject. Those facts are stated in the report and opinion of the Commission, under the heading "Facts," and will be found on *pages from 41 to 51*, inclusive, of the record. It is not probable that on a reinvestigation the Commission could state the facts more exhaustively than they have already done.

THE COMMISSION DID CONSIDER AND PASS UPON THE ONLY COMPETITION SET UP BEFORE IT.

An examination of the report and opinion of the Commission will further show that while the Commission erroneously held it could not, in arriving at its conclusions, give weight to competition by carriers subject to the act, it did consider and pass upon the only competition set up by the carriers before it. That competition was by the line from the eastern seaboard

cities via Cincinnati to Nashville with the line involved in this case from those cities via Chattanooga to Nashville. It was claimed on the part of the carriers that the rates by this line via Cincinnati to Nashville were forced down by river competition from Cincinnati to Nashville over the Ohio and Cumberland rivers, and that the line involved in this case through Chattanooga to Nashville had to meet these rates thus forced down. This, as we have heretofore shown, was in reality the only competition set up before the Commission, and the facts relating to this competition are fully set forth in *paragraph 7* of the report and opinion of the Commission (see Record, p. 48), and were duly considered and passed upon by the Commission in the succeeding paragraph, wherein the Commission announces its conclusion from those facts as follows:

"The lower rates accepted by the carriers engaged in the transportation of Eastern merchandise to Nashville via Chattanooga are not forced upon them by any water competition at the former place."

(See paragraphs 8 and 7, report and opinion of the Commission, Record, p 49).

BOTH THE LOWER COURTS CONSIDERED AND GAVE DUE WEIGHT TO THE TESTIMONY RELATING TO COMPETITION.

A large amount of additional testimony relating to competition—larger in amount than that taken before the Commission—was adduced before the court in this

case. Both the courts below duly considered and weighed all this testimony, both that before the Commission and that taken in court; they both recognized the error of the Commission in holding that competiton by carriers subject to the act could not be given weight to except under the proviso to the fourth section; and both based their decisions solely upon the facts in evidence relating to competition, which facts were presented to them more fully than to the Commission.

The carriers have thus had their "day in court" as to their defense of competition, and the error of law committed by the Commission has been fully cured.

DISTINCTIONS BETWEEN THE CASE AT BAR AND THE "BEHLMER CASE."

In all these respects the "Behlmer case" differs from the case at bar:

(1) In the "Behlmer case" the Commission did not undertake to make findings of fact relating to competition, but simply stated that the answers of the defendants set up competition, giving the averments in those answers on this subject, and then briefly disposed of the case by the statement that the competition set up was by carriers subject to the act, and therefore could not be considered except under the proviso to the fourth section.

(2) The Commission committed the further error in the "Behlmer case," as decided by this court, in holding that it could not consider competition of markets, but could only consider the competition of carriers engaged in the transportation of the traffic involved in the case from Memphis to Charleston. *There is no competition of markets set up in the present case.*

(3) The conclusions of the Commission in the "Behlmer case" were based solely on these errors, and the *circuit court of appeals, from whose decree in favor of the Commission the case was brought to this court on appeal, sustained these errors of the Commission and based its decree largely on those errors.*

As we have seen in the case at bar, neither the circuit court nor the circuit court of appeals sustained the error of the Commission, but examined, weighed, and gave full consideration to the testimony relating to competition and based their decrees thereon. This distinction between the "Behlmer case" and the case at bar is noted several times by this court in its opinion in the "Behlmer case." At one point in that opinion this court says:

"It follows that the decree of the circuit court must be reversed unless it be the duty of this court to examine the evidence, *which was not passed on by the Commission or the circuit court of appeals.*" * * *
(Page 12, pamphlet opinion.)

At another point in that opinion this court says:

"We have shown, in our previous analysis of the action of the Commission and of the views expressed by the circuit court of appeals, that whilst the facts were considered *in so far as was necessary to determine that the competition was due only to certain particular causes, the result of the competition was not examined in order to ascertain the substantial materiality of its operation on traffic and rates.* And this, because *both the Commission and the circuit court of appeals* determined that competition of the particular character which they found relied on to be, as a matter of law, however weighty in its operation on rates, was not legally entitled to be considered in reviewing the action of the carriers."
(Bot. p. 13, top p. 14, pamphlet opinion).

And again:

"If, then, we are to undertake the duty of weighing the evidence in this record, we would be called upon *as a matter of original action*, to investigate all these serious considerations which were shut out from view by the Commission, and *were not weighed by the circuit court of appeals*, because *both the Commission and the court erroneously construed the statute.*"
(P. 15, pamphlet opinion.)

(4) In the Behlmer case very little, if any, testimony was adduced before the court in addition to that before the Commission.

STATUTE PROVIDES FOR THE TAKING OF ADDITIONAL TESTIMONY BEFORE THE COURTS.

It is material to note that section 16 of the act to regulate commerce, which authorizes suits of this kind by the Commission, provides that the courts, if they deem it necessary to enable them to do justice, shall

have power "to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment." It is under this clause of the law that new and additional testimony is taken in these cases before the courts, *as was done in the present case.* It is manifest that the judgment or conclusion of the Commission from the testimony before it may be of little value after the case has been reopened and new testimony taken in the courts. A new case may be made, and in the "Alabama Midland case" the circuit court held that, because of the new testimony before it, the case as presented to the Commission was different from the case as presented to the court.

The mandate of the statute is that the courts shall do justice according to equity. If, when the facts are fully found by the Commission on the testimony before it, and new testimony is taken before the courts, the courts can not do justice according to equity on the facts thus more fully presented to the courts without the assistance of the judgment of the Commission on *a part of those facts*, then it will be the duty of the court to direct that the case be sent back to the Commission.

We do not think the court needs assistance from any source in doing justice according to equity, the facts relating to the matter in controversy being fully presented.

THE CASE BEFORE THE COURT IS A PROCEEDING DE NOVO.

Section 16 of the act to regulate commerce provides for the institution of a proceeding *de novo* based upon new pleadings and new evidence, and the courts have uniformly held, when the question has been before them, that these suits are new and independent proceedings in equity, and that it is the duty of the courts to do justice "*on the entire body of the evidence*" *before them.*

In construing section 16 of the law the circuit court said in the "Social Circle Case:"

"The Commission denies the power of this court to hear the case upon any other issues, pleadings, or facts than those presented to the Commission. It is claimed that the case is to be determined with reference to what the Interstate Commerce Commission had before it, and that no additional issues or questions should be raised or other evidence taken. The language of the act of Congress does not support this contention. * * * The question may be considered as settled, not only by the language of the act of Congress, but by authority, against the position assumed by counsel for the Commission." (56 Fed. Rep., pp. 934, 935.)

In the case of the Interstate Commerce Commission *v.* Cincinnati, New Orleans and Texas Pacific Railway Company et al. Judge Sage, in delivering the opinion of the circuit court at Cincinnati, said:

"The court is to sit as a court of equity, without the formal proceedings applicable to ordinary suits in equity,

but in such manner as *to do justice in the premises.* It is so provided in section 16 of the act. The intention of Congress evidently was to vest in the court *a large discretion.*" (64 Fed Rep., pp. 984–985.)

In the case of Shinkle, Wilson & Kreis Co. et al. *v.* Louisville and Nashville Railroad Company et al., in the United States circuit court at Cincinnati, Judge Lurton, in the opinion delivered by him, says:

"If it shall then" (that is, on final hearing in a suit in court to enforce an order of the Commission) "appear *on all the evidence heard and submitted* that the order of the Commission was lawful and reasonable and that it had been violated, it shall be lawful for such court to issue a writ of injunction or other proper process to prevent further disobedience of such order. Now, it is well settled that *the court is not the mere executioner of the orders of the Commission.* The suit in this court is an *original and independent proceeding.* This court is not confined to a mere examination of the matter as heard by the Commission. It proceeds to hear the complaint *de novo.* (62 Fed. Rep., p. 693.)

The duty and power of the court to "inquire into the facts on its own account" and try the case *de novo* are recognized in the "Import Case" (162 U. S., 239).

In the case of the Interstate Commerce Commission *v.* Alabama Midland Railway Company et al. (168 U. S., 175) the Supreme Court says:

"It has been uniformly held by the several circuit courts and the circuit courts of appeal in such cases that they are not restricted to the evidence adduced before the Commission, nor to a consideration merely of the power of the Commission *to make the particular order* in question, but that additional evidence may be

put in by either party, and that the duty of the court is to decide *as a court of equity upon the entire body of evidence.*"

It thus appears that the suit before the court is, in the language of Judge Lurton, "*an original and independent proceeding,*" and "*the court is not the mere executioner of the orders of the Commission;*" that, in the language of Judge Sage, the court is "*to do justice in the premises as a court of equity,*" and to this end is invested by Congress with "*a large discretion;*" and in the language of this court in the "Alabama Midland case," that the court is "*to decide as a court of equity upon the entire body of the evidence, and is not restricted to a consideration merely of the power of the Commission* TO MAKE THE PARTICULAR ORDER IN QUESTION."

In the present case, Judge Severens, delivering the opinion of the circuit court, after noting that the Commission had committed the error of holding that it could not give weight to competition by carriers subject to the act except under the proviso, says:

"In this undoubtedly the Commission was in error. A contrary doctrine is now well established. But this error is not material. The legal reason given may be wrong and the order right if upon the facts the latter should be found by the court to be warranted by law. Nor can it affect the duty of the court if the Commission had founded its order upon one provision of the act and the facts brought the case within some other. The question, therefore, is whether the order made was a lawful one in the circumstances as they are made to appear."

(Record, p. 370.)

THE CARRIERS PRACTICALLY IGNORED THE PROCEEDINGS BEFORE THE COMMISSION.

Taking advantage of the provision in section 16 of the law, to which we have referred, authorizing the courts to take new and additional evidence in these cases, the carriers almost invariably "reserve their fire," or, in the language of Senator Edmunds, in the "Alabama Midland case," "lie by," until the cases are before the courts. They introduce comparatively little evidence before the Commission, and wait to bring in the bulk of their testimony before the courts.

The present case is an illustration of this. The evidence in behalf of the carriers taken in court is many times larger than that taken before the Commission. This, too, notwithstanding this practice had received the condemnation of this court in Texas Pacific Ry. Co. *v.* Interstate Commerce Commission (162 U. S., p. 196), in which it is held that the facts of a case should be fully "disclosed to the Commission."

CHAPTER XXIII.

CLASSIFICATIONS.

Rates to Chattanooga are governed by the Southern freight classification and rates to Nashville by the official classification.

(Deposition of Jesse M. Smith, answer to interrogatory 11, Record, p. 230.)

It is testified by Van Den Berg and Guilladeau, witnesses for the roads, that as to some articles the official classification rules higher than the Southern—in other words, for instance, that an article may be in the fifth class under the Southern classification, while it is in the third class under the official classification. From this it was intended that the court should infer that such an article would take a higher rate under the official classification to Nashville than under the Southern classification to Chattanooga.

It will be found, however, that the rates on the six classes to Chattanooga are so much higher than the rates on the six classes to Nashville that an article may be in a lower class

under the Southern classification than under the official classification, and yet have a higher rate to Chattanooga under the Southern classification.

For the purpose of comparison in this connection, below are given the rates, in cents per hundred pounds, on the six classes to Chattanooga and to Nashville.

Classes.	To Chattanooga.	To Nashville.
1	1.14	0.91
2	.98	.78
3	.86	.60
4	.73	.42
5	.60	.36
6	.49	.31

It will be seen from the above table of rates that the second-class rate to Chattanooga is higher than the first-class rate to Nashville; that the third-class rate to Chattanooga is higher than the second-class rate to Nashville and nearly as high as the first-class rate to Nashville; that the fourth-class rate to Chattanooga is higher than the third-class rate to Nashville and nearly as high as the second-class rate to Nashville; that the fifth-class rate to Chattanooga is higher than the fourth-class rate to Nashville and as high as the third-class rate to Nashville, and that the sixth-class rate to Chattanooga is higher than the fourth and fifth class rates to Nashville.

The witness Guillandeau testifies that coffee and sugar are in the sixth class under the Southern classification and fourth class by the official classification.

If this be a fact, coffee and sugar would still have a higher rate to Chattanooga, because sixth rate under the Southern classification is 49 cents, while the class 4 rate under the official classification is only 42 cents.

Coffee is, however, in class 4 under both classifications, and the rate to Nashville is 42 cents, while to Chattanooga it is nearly twice as high—73 cents.

(Deposition of Jesse M. Smith, answer to interrogatory 11, Record, pp. 230, 231.)

The fact appears to be, as testified by the witness Jesse M. Smith in answer to interrogatories 13 and 14, that there are a large number of articles which are placed in the same class in both classifications; that there are some articles which are classed higher under the official classification than under the Southern, and some that are classed higher under the Southern classification than under the official; *but even where articles are classed higher under the official than under the Southern classification they still have lower rates under the official classification than under the Southern.*

(Deposition of Jesse M. Smith, answer to interrogatories 13 and 14, Record, pp. 252, 255.)

The principal articles shipped to Chattanooga from Eastern seaboard cities are *dry goods*, *boots* and *shoes*, *drugs* and *medicines*.

(*Depositions of McGill, Paine, Snow, Merriam, Timothy, and Dobbs, answers to interrogatory 25* Record, pp. 243, 245, 247, 253.)

These articles are all in the same class—class 1—in both the Southern and official classifications. (*Deposition of Jesse M. Smith, answer to interrogatory 11*, Record, pp. 230, 231.) They therefore take $1.14 rate to Chattanooga and a 91-cent rate to Nashville.

Jesse M. Smith, in answer to interrogatories 14, 15, and 16 (Record, pp. 232–234), gives the statements contained in the following three tables.

TABLE 1.—*Statement showing certain articles classed lower in official than in Southern classification, the rates on such articles from New York to Chattanooga and Nashville, and the differences in favor of Nashville.*

Articles.	From New York—				Difference in favor of Nashville.
	To Chattanooga.		To Nashville.		
	Southern classification.	Rate per 100 lbs.	Official classification.	Rate per 100 lbs.	
		Cents.		*Cents.*	*Cents.*
Cigars and cigarettes, boxed (not carded or strapped)	(1)	342	D. 1	182	160
Tobacco, plug, in boxes, any quantity	1	114	3	60	54
Same, released	2	98	3	60	38
Tobacco, leaf, in cases, any quantity	3	86	4	42	44
Chinaware, fine, in barrels or casks, any quantity	D. 1	228	2	78	150
Cheese, in boxes or casks, l. c. l., not released	1	114	3	60	54
Crockery, in barrels, l. c. l	1	114	4	42	72
Crockery, in barrels, c. l	1	114	5	36	78
Same, released, l. c. l	2	98	4	42	56
Same, released, c. l	2	98	5	36	62
Hardware, n. o. s., boxed, any quantity	2	98	3	60	38
Pickles, in glass, c. l	3	86	5	36	52
Same, released, c. l	4	73	5	36	37
Starch, in bags, l. c. l	2	98	4	42	56
Starch, in boxes, l. c. l	3	86	4	42	44
Starch, c. l	5	60	6	31	29
Tinware, n. o. s., c. l	2	98	4	42	56
Typewriters and caligraphs, boxed or crated, c. h	1	114	3	60	54

[1] Three times class 1.

TABLE II.—*Statement showing certain articles classed lower in the Southern than in the official classification, the rates on such articles from New York to Chattanooga and Nashville, and the differences in favor of Nashville.*

Articles.	From New York—				Difference in favor of Nashville.
	To Chattanooga.		To Nashville.		
	Southern classification.	Rate per 100 lbs.	Official classification.	Rate per 100 lbs.	
		Cents.		*Cents.*	*Cents.*
Agricultural implements, c. l.	6	49	5	36	13
Cotton piece goods	5	60	3	60	.....
Coffee, single sacks, l. c. l.	4	73	4	42	31
Coffee, single sacks, c. l	4	73	6	31	42
Coffee, double sacks, l. c. l.	6	49	4	42	7
Coffee, double sacks, c. l.	6	49	6	31	18
Sugar, n. o. s., in barrels, l. c. l.	6	49	4	42	7
Sugar, n. o. s., in barrels, c. l.	6	49	6	31	18
Crackers, c. l	5	60	4	42	18
Handles, wooden, n. o. s	6	49	5	36	13
Nails and spikes, in kegs, l. c. l.	6	49	4	42	7
Nails and spikes, in kegs, c. l.	6	49	5	36	13
Leather, in boxes, l. c. l	3	86	2	78	8
Molasses, in barrels or hogsheads, l. c. l.	6	49	4	42	7
Molasses, in barrels or hogsheads, c. l	6	49	5	36	13

TABLE III.—*Certain articles given a special commodity rate of 85 cents per hundred pounds from New York to Nashville, but charged the class 1 rate of $1.14 per hundred pounds to Chattanooga.*

"Blankets, boots and shoes, buttons, carpets, clothing, collars, combs, comfortables, corsets; drugs, n. o. s.; dry goods, n. o. s.; fans, folding; gloves, hats, caps, hosiery, matting, medicine, millinery, notions, pins, rugs, shirts, silks, suspenders, table oilcloth, thread, umbrellas, underwear, waddings."

"The special rate New York to Nashville on the above articles is 85 cents per hundred pounds. Nearly all of these articles are in first class in the southern classification, and the rate to Chattanooga on same would therefore be $1.14 per hundred pounds."

Rate on above articles per minimum carload of 24,000 pounds to Nashville	$204.40
Rate per minimum carload of 24,000 pounds to Chattanooga	273.60
Excess of Chattanooga rate	69.20

THE CHATTANOOGA MERCHANTS TESTIFY THAT THE BULK OF THE TRAFFIC FROM EASTERN SEABOARD CITIES TO CHATTANOOGA CONSISTS OF DRY GOODS, BOOTS AND SHOES, DRUGS AND MEDICINES, WHICH ARE IN CLASS 1 IN BOTH CLASSIFICATIONS, AS SEEN BELOW. (Record, pp. 243, 244.)

J. M. Smith testifies that a few of the principal articles in each class of the two classifications are as follows (Record, pp. 230, 231):

First class:
- Dry goods, n. o. s.
- Boots and shoes.
- Tobacco.
- Drugs and medicines, n. o. s.
- Rubber goods, n. o. s.
- Musical instruments, n. o. s.

Second class:
- Saddlery, n. o. s.
- Glassware, common, n. o. s.
- Hardware, n. o. s., boxed.
- Matting, n. o. s.
- Mills, n. o. s.
- Tinware, n. o. s.

Third class:
- Cordage and twine.
- Machinery and machines, n. o. s., l. c. l.
- Stoves, n. o. s., stove furniture, and hollow ware, l. c. l.
- Bicycles, k. d., c. l.
- Wire, n. o. s.
- Leather, in rolls or boxes, l. c. l.

Fourth class:
- Rope, n. o. s., l. c. l.
- Canned goods, n. o. s., l. c. l.
- Coffee, green, single sacks.
- Dye, liquid, n. o. s., in barrels.
- Handles, n. o. s., boxed or crated, l. c. l.
- Cotton-seed oil mills.

Fifth class:
- Cotton piece goods.
- Rope, wire, l. c. l.
- Canned goods, n. o. s., c. l.
- Stoves, n. o. s., stove plates, stove furniture, and hollow ware, c. l.
- Tin plate, in boxes, l. c. l.
- Roofing felt, in bundles or rolls.
- Babbitt metal, in boxes, barrels, or casks.

Sixth class:
- Rope, n. o. s., c. l.
- Cement, n. o. s., in barrels or sacks, l. c. l.
- Coffee, green, in double sacks.
- Handles, n. o. s.
- Molasses and sugar, in barrels or hogsheads.
- Paper for the manufacture of bags, in rolls, l. c. .
- Soap, common, in boxes.

Official classification.

First class:
- Dry goods, n. o. s., in bales or boxes, l. c. l.
- Boots and shoes, in boxes, l. c. l.
- Drugs and medicines, n. o. s., l. c. l.
- Earthenware and crockery, l. c. l.
- Vehicles, l. c. l.
- Saddlery, boxed, n. o. s., l. c. l.
- Sewing machines, s. u., boxed or crated, l. c. l.

Second class:
- Spice, l. c. l.
- Leather, l. c. l.
- Printing paper, n. o. s., l. c. l.
- Machines and machinery, n. o. s., crated or boxed, l. c. l.
- Matting, l. c. l.

Third class:
- Bags or bagging, burlaps or gunny, in bales or rolls.
- Cotton bagging, l. c. l.
- Hardware, n. o. s., l. c. l.
- Cotton piece goods, l. c. l.
- Vehicles, n. o. s., c. l.
- Printing paper, l. c. l.

Fourth-class:
- Coffee, l. c. l.
- Sugar, l. c. l.
- Horseshoes, l. c. l.
- Matting, n. o. s., c. l.
- Leather, c. l.
- Sewing machines, c. l.
- Wall plaster, n. o. s., l. c. l.

Fifth class:
- Agricultural implements, c. l.
- Axle grease, c. l.
- Babbitt metal, c. l.
- Printing paper, n. o. s., and newspapers, c. l.
- Machines and machinery, n. o. s., c. l.
- School slates, c. l.

Sixth class:
- Coffee, c. l.
- Grain and grain products, c. l.
- Plaster, wall, n. o. s., c. l.
- Rails, old and new, c. l.
- Roofing tile, c. l.
- Sugar, c. l.

CHAPTER XXIV.

INCREASE IN POPULATION OF NASHVILLE AND CHATTANOOGA FROM 1860 TO 1890.

THE INCREASE AT NASHVILLE HAS BEEN 59,180.

THE INCREASE AT CHATTANOOGA HAS BEEN 26,555.

Counsel for carriers, in his printed arguments in the courts below, gives the following statistics, purporting to be taken from the United States Census Reports:

Decade from 1860 to 1870.

Population of Nashville in 1860	16,988
Population of Nashville in 1870	25,865
Increase of 52 per cent	8,877
Population of Chattanooga in 1860	2,545
Population of Chattanooga in 1870	6,093
Increase of 139 per cent	3,548

Decade from 1870 to 1880.

Population of Nashville in 1870	25,865
Population of Nashville in 1880	43,350
Increase of 67 per cent	17,485
Population of Chattanooga in 1870	6,093
Population of Chattanooga in 1880	12,892
Increase of 111 per cent	6,799

Decade from 1880 to 1890.

Population of Nashville in 1880	43,350
Population of Nashville in 1890	76,168
Increase of 75 per cent	32,818
Population of Chattanooga in 1880	12,892
Population of Chattanooga in 1890	29,100
Increase of 125 per cent	16,208

These statistics are introduced to show that Chattanooga has prospered more than Nashville, notwithstanding Chattanooga has been *handicapped* by rates giving Nashville so great a preference over Chattanooga, as has been shown in this case.

This, if it be true, results from Chattanooga's great natural advantages. A fleet race horse, though handicapped, often wins the race, but this is no evidence he is not handicapped.

But these statistics do not prove that Chattanooga has prospered more than Nashville. THEY SHOW THE CONTRARY.

Counsel for carriers calls the attention of the court to the *percentages of increase*, and *not the actual increase* in population, respectively, of Chattanooga and Nashville. The percentage of increase manifestly is always greater with reference to a small than a large city. For example, Possum Snout, in Haralson County, Ga., had a population of 50 one year, and within a year afterwards had grown to 150, an increase of 200 per cent in

one year, which, if kept up for a decade, would amount to 2,000 per cent.

Nashville started out in 1860 with a population of 16,988, about seven times the population of Chattanooga, which was then 2,545; hence a comparatively small increase in the populatiom of Chattanooga would amount to a greater percentage than a much larger increase in the population of Nashville. *Two (2) is a larger percentage of 1 than 5 is of 7.* An increase of *a half million* in the population of New York would not be as large a percentage of its prior population as an increase of 70,000 would be of the prior population of Nashville.

The true test is the *actual increase* in population, which for the three decades, as to Nashville and Chattanooga, is as follows:

Nashville increase from 1860 to 1870	8,877
Chattanooga increase from 1860 to 1870	3,548

Nashville increase about three times that of Chattanooga.

Nashville increase from 1870 to 1880	17,485
Chattanooga increase from 1870 to 1880	6,799

Nashville increase nearly three times as great as Chattanooga increase.

Nashville increase from 1880 to 1890	32,818
Chattanooga increase from 1880 to 1890	16,208

Nashville increase over twice as large as Chattanooga increase.

The total increase of Nashville in population for the three decades appears to be 59,180, while that of Chattanooga was only 26,555.

When we consider Chattanooga's natural advantage in being located 151 miles nearer ocean competition at the South Atlantic ports and the same distance nearer by all the direct and most practicable lines to sources of supply in Eastern seaboard cities, and the further fact that Chattanooga has nine railroads, while Nashville has only two, the excess of Nashville's growth over that of Chattanooga is "startling," *and can only be attributed to the discrimination in rates against Chattanooga and in favor of Nashville, which has prevailed during a large portion of the three decades from 1860 to 1890.*

O

No. 135
Sup. Ct. Br. of Q. G.
for Appellee.

FILED
MAR 8 1900
JAMES H. MCKENNEY,
Clerk.

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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 135.

THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILWAY COMPANY ET AL.,
APPELLANTS,

v.

THE INTERSTATE COMMERCE COMMISSION,
APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLEE.

JAMES E. BOYD,
Assistant Attorney General, and
L. A. SHEVLIN,
For Appellee.

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I.

THE TRUNK LINES TO CINCINNATI ARE PARTIES DEFENDANT IN THIS CASE.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC ROAD, EXTENDING FROM CINCINNATI TO CHATTANOOGA, IS A PARTY DEFENDANT.

THE LOUISVILLE AND NASHVILLE RAILROAD, EXTENDING FROM CINCINNATI TO NASHVILLE, IS A PARTY DEFENDANT.

HENCE THE LINES VIA CINCINNATI TO CHATTANOOGA AND VIA CINCINNATI TO NASHVILLE ARE INVOLVED, AND ARE COVERED BY THE ORDER OF THE COMMISSION AS WELL THE LINES THROUGH CHATTANOOGA.

The roads composing the trunk lines from the Eastern seaboard to Cincinnati are parties defendant in this case, to wit: The Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, The Pennsylvania Railroad Company, The Pennsylvania Company, The New York, Lake Erie and Western Railroad Company, The New York and New England Railroad Company, and The Delaware and Hudson Canal Company.

(*See Transcript of Record, p. 1.*)

The Cincinnati, New Orleans and Texas Pacific Railway Company, which extends from Cincinnati to Chattanooga, is a party defendant.

The Louisville and Nashville road became a party defendant *after the case had passed out of the hands of the Commission and was pending in the circuit court.* It filed its answer in the circuit court May 6, 1893.

(*See Transcript of Record, p. 87.*)

Hence the line from the eastern seaboard both via Cincinnati to Chattanooga and via Cincinnati to Nashville are involved in, and subject to, the order of the Commission in this case as well as the lines through Chattanooga.

The name of the Louisville and Nashville road does not appear in the proceedings before the Commission, and does not appear in the proceedings before the court until it came in voluntarily and filed its answer as above stated. By doing so it became subject to the order of the Commission and the decrees of the courts.

After it had filed its answer May 6, 1893, it was subsequently by order of the court on, to wit, July 26, 1893, formally made a party by the order of the circuit court.

(*See transcript of Record, pp. 104, 105.*)

II.

WHEN THE COMMISSION HELD THAT THE "DEFENDANT LINES" WERE NOT RESPONSIBLE FOR THE LOW RATES BY THE LINE VIA CINCINNATI TO NASHVILLE, THE LOUISVILLE AND NASHVILLE ROAD WAS NOT A DEFENDANT.

Counsel for the carriers quotes in his printed argument filed in this court (p. 64) the statement by the Commission that—

> "The rate by the lines operating through Chattanooga is made by the all-rail carriers via Cincinnati and *their action is uncontrolled by the defendant lines.*"

When the Commission made this finding the Louisville and Nashville road had not appeared as a party defendant. If it had been a party defendant, the Commission could not and would not have made this finding, because it is admitted that the low rates by the line via Cincinnati to Nashville are attributable solely to the Louisville and Nashville Railroad, which, although not a defendant before the Commission, has, as above shown, made itself a party defendant in the case before the court.

It is, therefore, not now true that the rates by the rail line via Cincinnati to Nashville "are uncontrolled by defendant lines."

III.

THE FACT, IF IT BE A FACT, THAT THE LINE VIA CINCINNATI TO NASHVILLE MAY, BY MAINTAINING LOW RATES TO NASHVILLE, DEPRIVE CHATTANOOGA OF ANY BENEFIT UNDER THE ORDER, IS NO GROUND FOR DECLARING THE ORDER UNLAWFUL.

IT IS TO BE PRESUMED THAT THE NATURAL AND PROPER COURSE OF REDUCING THE RATES TO CHATTANOOGA WILL BE ADOPTED.

IF THE LOUISVILLE AND NASHVILLE ROAD SHOULD CONTINUE LOW RATES FROM CINCINNATI TO NASHVILLE, IT WOULD VIOLATE SECTION 3 OF THE LAW, IF IT MAINTAINED HIGHER RATES TO CHATTANOOGA BY THE LINE IT CONTROLS VIA AUGUSTA TO CHATTANOOGA.

It is no ground for declaring the order of the Commission unlawful that in the event it is complied with by advancing the Nashville rates, on the line through Chattanooga, the Louisville and Nashville road may maintain existing rates via Cincinnati to Nashville and thus deprive Chattanooga of all benefit under the order. When that emergency arises it can be looked after.

It is not at all probable that the threat to thus nullify the order of the Commission will be carried out. The "VAST MAJORITY" of the Nashville traffic from the eastern seaboard passes through Chattanooga and thence over the Nashville, Chattanooga and St. Louis Railway to Nashville.

(See transcript of Record, hot. p. 126).

It is not probable that the Nashville, Chattanooga and St. Louis Railway would advance its rates so as to jeopardize its transportation of this traffic, and it is not to be supposed that the Louisville and Nashville road would maintain rates such as would require the former road, which it virtually owns and controls, to sacrifice this traffic. They are one system, and their interests in this traffic are the same.

The Louisville and Nashville road is further interested in the transportation of this traffic through Chattanooga *all the way from Augusta to Nashville.*

If the Louisville and Nashville road should continue low rates to Nashville from Cincinnati, it would violate section 3 of the law in maintaining higher rates to Chattanooga on the line via Augusta to Chattanooga.

IV.

THE ORDER SHOULD BE OBEYED BY REDUCING CHATTANOOGA RATES.

The natural and proper mode of complying with the order is to reduce the Chattanooga rates. The Commission recommends this (see Transcript of Record, p. 54), and if, as we show in our original printed argument, the Chattanooga rates are excessive, this is the only proper mode of compliance with the order.

If the Nashville, Chattanooga and St. Louis road does not advance the Nashville rates it will be incumbent on the *roads terminating at Chattanooga* to reduce the Chattanooga rates. THE RATES TO CHATTANOOGA, IF REDUCED TO THE LEVEL OF THE NASHVILLE RATES, WILL PAY THE ROADS TERMINATING AT CHATTANOOGA A HIGHER RATE ON CHATTANOOGA TRAFFIC THAN THEY NOW RECEIVE ON TRAFFIC TO NASHVILLE. THEY NOW RECEIVE ON TRAFFIC TO NASHVILLE ONLY A PROPORTION OF THE NASHVILLE RATE. THEY WILL THEN RECEIVE THE WHOLE OF THE RATE TO NASHVILLE FOR TRANSPORTATION OF THE TRAFFIC TO CHATTANOOGA.

V.

ALL THE ROADS RESPONSIBLE FOR THE DISCRIMINATION AGAINST CHATTANOOGA IN FAVOR OF NASHVILLE ARE BEFORE THE COURT, NAMELY, THE LINES THROUGH CINCINNATI TO BOTH CHATTANOOGA AND NASHVILLE, AS WELL AS THE LINES THROUGH CHATTANOOGA TO NASHVILLE.

THE LOUISVILLE AND NASHVILLE ROAD DOMINATES AND IS RESPONSIBLE FOR THE SITUATION.

THE THIRD SECTION OF THE ACT APPLIES, IF THE FOURTH DOES NOT.

As we have seen, all the roads responsible for the discrimination in favor of Nashville and against Chattanooga are before the court—both the lines via Cincinnati to Chattanooga and Nashville, as well as the lines through Chattanooga to Nashville.

The difference in rates as between Chattanooga and Nashville commences at Cincinnati, and for this THE LOUISVILLE AND NASHVILLE ROAD IS ALONE RESPONSIBLE.

It is conceded that the Louisville and Nashville road controls not only the only other road that enters Nashville, but the line from Nashville through Chattanooga

and Atlanta all the way to Augusta, which constitutes three-fourths or more of the rail portion of one of the principal routes from the Eastern seaboard by ocean to Savannah and thence by rail to Nashville. *Counsel for the carriers in his oral argument stated that if the Louisville and Nashville controlled the line all the way from Augusta by Savannah to the Eastern seaboard* (as was found by Judge Taft), it might be held responsible in this case. We think its control of the line from Nashville to Augusta makes it equally responsible.

THE THIRD SECTION APPLIES IF THE FOURTH DOES NOT.

Counsel for the carriers admits on page 69 of his printed argument filed in this court that—

"Though the circumstances and conditions at Nashville may be substantially dissimilar from those at Chattanooga, and though such dissimilarity may take the case out of the operation of the fourth section, the third section remains; and if it can be shown that the disparity in rates constitutes an undue preference of Nashville, the rates may be declared to be unlawful."
(See printed argument of counsel for carriers, p. 69).

The Louisville and Nashville Company owns absolutely the line from Cincinnati to Nashville, and it controls the line all the way from Augusta through Chattanooga to Nashville, the terminal member of the latter line being the only other road that enters Nashville. It is, as we have shown, solely responsible for the rates by the line via Cincinnati to Nashville, and it has a large influence over the rates on the line from the east-

ern seaboard via Augusta to Chattanooga. IF THIS DOES NOT BRING IT WITHIN THE LETTER OF THE FOURTH SECTION, IT BEYOND DOUBT MAKES THE LOUISVILLE AND NASHVILLE ROAD RESPONSIBLE UNDER THE THIRD SECTION FOR AN UNDUE PREFERENCE OF NASHVILLE.

It is no answer to this to say that the order of the Commission follows the language of the fourth section in forbidding the greater charge for the shorter haul to Chattanooga than for the longer haul to Nashville.

This order will afford relief under section 3 as well as under section 4. It will remove, measurably at least, the undue preference of Nashville and the unjust prejudice to Chattanooga by enabling Chattanooga merchants to compete on equal terms, so far as rates are concerned, with Nashville merchants in territory half way between Chattanooga and Nashville, and will enable Chattanooga to hold the territory immediately tributary to it in all directions so far as Nashville is concerned.

As we have shown in our original printed argument, this court and the circuit courts and the circuit courts of appeals have held that cases like the present are "original and independent proceedings;" that "the court is not the mere executioner of the orders of the Commission;" that the court is invested by Congress with a "LARGE DISCRETION;" that the court "is to do

justice as a court of equity;" and that, in the language of this court in the Alabama Midland Case, the court is "to decide as a court of equity upon the entire body of the evidence, and it is not restricted to a consideration merely of the power of the Commission TO MAKE THE PARTICULAR ORDER IN QUESTION."

I. C. C. *v.* Ala. Mid. Ry. Co., 168 U. S., 175.
Shinkle, Wilson Co. *v.* L. & N. R. R. Co., 62 Fed. Rep., 693.
I. C. C. *v.* C., N. O. & T. P. Ry. Co., 64 Fed. Rep., pp. 984, 985.
I. C. C. *v.* C., N. O. & T. P. Ry. Co., 56 Fed. Rep., 934, 935.
(See original printed argument for appellee, pp. 1 2–164.)

The court having before it all the parties in any way responsible, it is the duty of the court to do justice as a court of equity.

The language of this court in the Alabama Midland Case, quoted above, namely, that "the court is not restricted to a consideration merely of the power of the Commission *to make the particular order in question*," would seem to imply or recognize power in the court to change or modify the order so as to adapt it to the ends of justice.

VI.

NOT NECESSARY TO ADVANCE NASHVILLE RATES OR TO REDUCE CHATTANOOGA RATES TO THE FULL EXTENT OF THE ENTIRE DIFFERENCE BETWEEN THOSE RATES.

We again call attention to the fact, which is commented on in our original printed argument, that counsel for the carriers and his witnesses based their objections to the order in this case on the ground that it requires either an advance of the Nashville rates or a reduction of the Chattanooga rates to the *full extent of the difference* existing between those rates.

That this is an erroneous assumption is clear from the fact that the rates to Chattanooga may be made not higher than those to Nashville by reducing the Chattanooga rates to the extent of one-fourth, one-third, one-half, two-thirds, or other proportion of the difference between the two sets of rates and simultaneously advancing the Nashville rates to the extent of three-fourths, two-thirds, one-half, one-third, or other proportion of that difference.

(See original printed argument for appellee, pp. 82, 83.)

VII.

FORMER POSITION ABANDONED.

NOW CONTENDED THAT THE LOW RATES OF THE LOUISVILLE AND NASHVILLE ROAD FROM CINCINNATI TO NASHVILLE ARE MADE NECESSARY BECAUSE OF THE DUTY OF THAT ROAD TO PROTECT NASHVILLE.

In the answers of the defendants filed in this case, and heretofore in the argument of counsel, it was claimed that the low rates of the Louisville and Nashville road from Cincinnati to Nashville were forced upon that road by river competition of the Ohio and Cumberland rivers from Cincinnati or Evansville to Nashville. Counsel for the carriers announced before the court in his oral argument that this position was no longer relied upon. The contention now is that these low rates result, not from river competition, but from the fact that the Louisville and Nashville road was compelled to extend cheap trunk-line rates from Cincinnati to Nashville *in order to protect Nashville in her competition with the Ohio River points—Cincinnati, Louisville, and Evansville to the north and west of her.*

If this be the right and duty of the Louisville and Nashville road, it is equally the duty of the Cincinnati, New Orleans and Texas Pacific road to extend cheap trunk-line rates from Cincinnati *to Chattanooga, in order to protect Chattanooga in her competition with Nashville in territory to the northwest of Chattanooga.*

VIII.

MOTIVE OF THE DISCRIMNATION AGAINST CHATTANOOGA IN FAVOR OF NASHVILLE.

The Louisville and Nashville road, having control of the only other road that enters Nashville, *has a practical monopoly of the transportation business to and from Nashville.* This business amounts to a great deal, Nashville being now a city of about 100,000 inhabitants. Hence, counsel for carriers stated in his printed arguments filed in the circuit court and the circuit court of appeals, "THE LOUISVILLE AND NASHVILLE ROAD IS VITALLY INTERESTED IN MAINTAINING THE COMMERCIAL IMPORTANCE OF NASHVILLE."

This, we believe, to be the motive of the discrimination in favor of Nashville against Chattanooga.

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I.

LOUISVILLE AND NASHVILLE RAILROAD RESPONSIBLE FOR LOWER RATES BY LINE VIA CINCINNATI TO NASHVILLE THAN TO CHATTANOOGA.

Counsel in his reply brief (p. 4) states that we are in error in saying that "it is admitted that the *low* rates by the line *via Cincinnati* to Nashville are attributable solely to the Louisville and Nashville Railroad," and contends that the trunk-line roads from the eastern seaboard to Cincinnati are jointly responsible for those low rates. It is true our statement would have been more accurate if we had said the *lower* rates by that line to Nashville than to Chattanooga are attributable to the Louisville and Nashville road.

The proof shows, and it is not denied, that the trunk lines charge the *same rates* as far as Cincinnati on shipments of traffic from the Eastern seaboard to Chattanooga that they charge on such shipments to Nashville. *The trunk-line rates are the same whether the shipments are to Nashville or to Chattanooga. Therefore, the lower rates via Cincinnati to Nashville than to Chattanooga are not attributable to the trunk lines. The lower rates by that route to Nashville commence at Cincinnati, and for this the Louisville and Nashville road is responsible.* (*See original printed argument for appellees, pp. 28, 29.*)

The rates of the Louisville and Nashville road from Cincinnati to Nashville and those of the Cincinnati, New Orleans and Texas Pacific road from Cincinnati to Chattanooga are shown below:

	1	2	3	4	5	6
Cincinnati to Chattanooga	49	41	42	43	34	27
Cincinnati to Nashville	26	21	16	12	10	9

(*See Report and Opinion of the Commission, transcript of record, pp. 43, 44.*)

II.

OWNERSHIP OR CONTROL OF ENTIRE LINE FROM EASTERN SEABOARD TO NASHVILLE NOT NECESSARY TO IMPOSE RESPONSIBILITY.

MEMBERSHIP IN THE THROUGH LINE SUFFICIENT.

OTHERWISE NONE OF THE DEFENDANTS ARE RESPONSIBLE, BECAUSE NONE OF THEM OWN OR CONTROL AN ENTIRE THROUGH LINE.

At the bottom of page 5 of his reply brief, counsel for the carriers says:

"If the Louisville and Nashville Railroad Company owned a line from New York via Augusta to Chattanooga and Nashville, *it might be held responsible for the relative adjustment of rates as between Chattanooga and Nashville.*"

This is equivalent to saying that the defendant carriers are only responsible where they own or control the entire through line. *If this be so, then none of the defendants are responsible, because none of them own or control an entire through line.*

It is too plain for argument that this position is not tenable. Responsibility results from participation by each member of the through line in the joint through rates complained of and in the transportation under

those rates. The through rates are the result of contract between the members of the through line and *their liability is both joint and several.*

In Texas and Pacific Ry. vs. *Interstate Commerce Commission* (*162 U. S., p. 205*), the proceeding was against the Texas and Pacific Railway Company alone, and objection was made that "the order of the Commission involved rates participated in by the Southern Pacific Company, as owner of a portion of the line over which the through freight was carried, and that the latter company was therefore a necessary party." But this court overruled the objection, saying, "*undoubtedly that company would have been a proper party, but we agree with the circuit court in thinking that it was not a necessary one.*" This shows the liability is *several as well as joint*, and that ownership or control of the entire line is not necessary to liability.

The line from Nashville through Chattanooga, Atlanta, Augusta, and Savannah on to the eastern seaboard is one of the principal lines involved in this case. The Louisville and Nashville road owns or controls that line all the way from Nashville through Chattanooga and Atlanta to Augusta, if not, as held by Judge Taft, all the way on through Savannah to the eastern seaboard. *It participates in the through rates charged over that line from the eastern seaboard to both Chattanooga and Nashville. This clearly fixes responsibility on that road.*

III.

THE LOUISVILLE AND NASHVILLE ROAD APPEARED VOLUNTARILY AND BECAME A PARTY DEFENDANT AFTER THE CASE IN COURT WAS INSTITUTED.

THE APPEARANCE OF THE LOUISVILLE AND NASHVILLE ROAD WAS NOT SPECIAL OR LIMITED, BUT GENERAL.

THE DEFENSE SET UP IN ITS ANSWER APPLIED TO AND INVOLVED DIRECTLY ITS OWN ROAD FROM CINCINNATI TO NASHVILLE.

(*a*) Counsel for the carriers denies in his reply brief that the Louisville and Nashville road "came into the case voluntarily." It is, perhaps, immaterial whether it appeared voluntarily or involuntarily; *the material fact is that it is a party defendant in court, and as such is subject to the order of the Commission and the decree of the court.*

It is beyond question, however, in our opinion, that the Louisville and Nashville road did "come into the case voluntarily."

The complaint before the Commission is on pages from 9 to 12, inclusive, of the record. The name of the

Louisville and Nashville road does not appear in that complaint as a party defendant or in any way. *It was not served with a copy of the complaint before the Commission.*

(*Transcript of record, pp. 9–12.*)

The petition or bill of complaint of the Commission in the United States circuit court for the eastern district of Tennessee will be found on pages from 2 to 8 of the record. The name of the Louisville and Nashville road does not appear in that bill of complaint as a party defendant or in any way. *It was not served with a copy of that bill of complaint.*

(*Transcript of record, pp. 2 to 8.*)

Making a party defendant of the Georgia Railroad Company, which it is said did not exist as a corporation, was not equivalent to suing the Louisville and Nashville Railroad.

In Paragraph VI of its answer filed in court, the Louisville and Nashville road alleges that it "did not appear" in the proceeding before the Commission.

(*Transcript of record, p. 89.*)

Not being a party defendant and not being served with process, the Louisville and Nashville road *voluntarily abstained* from appearing in the proceeding before the Commission, and not being a party defendant and not being served with process in the proceeding before the

court, its appearance and the filing of its answer was *voluntary.*

(*See transcript of record, pp. 87–93.*)

(*b*) THE APPEARANCE OF THE LOUISVILLE AND NASHVILLE ROAD IN COURT WAS NOT SPECIAL, BUT GENERAL.

On an examination of the answer of the Louisville and Nashville road it will be found that its appearance was not special or limited, but general. *If it could limit its liability as a defendant, under the circumstances in this case, to its interest in the line which it controls from Augusta through Atlanta and Chattanooga to Nashville, it did not do so.*

(*c*) THE DEFENSE SET UP IN THE ANSWER APPLIED TO ITS ROAD FROM CINCINNATI TO NASHVILLE.

An examination of the answer of the Louisville and Nashville road will show that the defense set up is that the rail rates from Cincinnati to Nashville are made lower than would otherwise be charged by river competition of the Ohio and Cumberland rivers from Cincinnati or Evansville to Nashville.

(*See Subdivision VII of Paragraph X, and also Paragraph XII of answer, pp. 91, 92, transcript of record.*)

This defense applies directly to the road of the Louisville and Nashville Company from Cincinnati to

Nashville, *because the rail rates from Cincinnati to Nashville are those of the Louisville and Nashville road alone.*

The Louisville and Nashville road, therefore, does not in its answer limit its defense to the line it controls from Augusta through Atlanta and Chattanooga to Nashville.

IV.

NO QUESTION OF COMPETITION OF MARKETS IN THIS CASE.

COUNSEL'S ERRONEOUS INTERPRETATION OF THE QUESTION OF MR. JUSTICE WHITE.

Mr. Justice White during the oral argument asked counsel for the carriers a question which he states in his reply brief (p. 14) to have been as follows:

> "Can the Louisville and Nashville Railroad Company justify the acceptance of exceptionally low rates to a city on its line when it is not compelled to do so by competition of other carriers at that city and the sole motive for doing so is to enable that city to compete with other cities located on other railroads?"

He contends that in effect this question is, to use his language, "whether *competition between markets* can be taken into consideration by carriers in charging less to longer than to shorter distance points," and says that it was involved in the case of L. & N. R. R. Co. *v.* Behlmer (175 U. S., p. —), decided at the present term.

We think that in this counsel for the carriers is in error. We can not see how the question propounded

by the court involves *the competition between markets referred to in the Behlmer case.* That competition was between *producing* as distinguished from *consuming* markets. It was contended that lower rates from Memphis to Charleston than to Summerville were justified because Chicago, New York, and other Eastern points competed in the sale of hay and grain at Charleston.

It is not necessary for us in this case to contest the proposition that competition between *producing* markets may be taken into consideration in establishing rates. *There is no such question in this case.* The proof shows that all the *producing* markets that compete for business to Nashville also compete for business to Chattanoga.

The proof shows not only that all the markets which compete for Nashville business compete also for Chattanooga business, but that *there are many more lines of transportation leading from those markets to Chattanooga than lead to Nashville.*

The competition referred to by Mr. Justice White in his question was that between Nashville and Chattanooga in the sale in common territory of goods shipped to those cities, respectively, from the eastern seaboard cities—those cities sustaining toward Chattanooga and Nashville the relation of *producing* markets.

V.

CONTENTION THAT COURT HAS NO POWER TO "MAKE A NEW ORDER SUBSTANTIALLY DIFFERENT FROM THE ORDER MADE BY THE COMMISSION."

WHERE A CARRIER NOT A PARTY BEFORE THE COMMISSION, AND HENCE NOT EMBRACED IN ITS ORDER, SUBSEQUENTLY BECOMES A PARTY TO THE PROCEEDING BEFORE THE COURT, THE COURT MAY, IF NECESSARY TO THE ENDS OF JUSTICE, MODIFY THE ORDER SO AS TO MAKE IT APPLICABLE TO SUCH CARRIER AND ITS VARIOUS LINES OF RAILWAY PARTICIPATING IN SOME OR ALL THE RATES IN QUESTION.

Counsel for the carriers devotes much space in his reply brief to an endeavor to show that "this court has no power to make a *new order substantially different* from the order made by the Commission."

It is not absolutely necessary in this case that the court should have or exercise such power, inasmuch as the order of the Commission will afford relief *as to the line through Chattanooga*, under section 3 as well as under section 4.

(See original printed argument for appellee, pp. 105, 106, and supplemental argument for appellee, p. 13.)

The order of the Commission, if complied with by reducing the Chattanooga rates, may also, measurably at least, afford relief under section 1, which forbids the exaction of excessive rates.

COURT MAY MODIFY ORDER IN THIS CASE, IF DEEMED NECESSARY.

While it is not necessary to contend in this case that the court may make "a *new order substantially different* from that of the Commission," we insist that the court may *modify* the order of the Commission.

A modification of the order of the Commission is proper, if necessary to the ends of justice, because the Louisville and Nashville road was not a defendant and did not appear before, *and its interest in the matter in controversy was not disclosed to*, the Commission, AND HENCE IT WAS NOT EMBRACED IN THE ORDER OF THE COMMISSION.

Where a carrier not a party to the proceeding before the Commission *and whose interest in the matter in controversy is not disclosed to the Commission and who for that reason is not embraced in its order*, subsequently becomes a party to the proceeding in court, it is manifestly the duty and the right of the court, *if deemed necessary to the ends of justice*, to so modify the order as to make it applicable to that carrier and its various lines participating in some or all the rates in question.

THE DECREE OF THE CIRCUIT COURT, WHICH WAS AFFIRMED BY THE CIRCUIT COURT OF APPEALS, REQUIRES ALL THE DEFENDANTS BEFORE THE COURT TO OBEY THE ORDER.

While the order of the Commission did not apply to the Louisville and Nashville road *eo nomine*, the decree of the circuit court, which was affirmed by the circuit court of appeals, applies to *all the defendants in court*. The language of the decree is that "*the various defendants, each and all of them*," obey the order of the Commission.

(*Transcript of record, p. 381.*)

The order of the Commission, however, strictly speaking, applies only to the line or lines *through Chattanooga* to Nashville, because it forbids the greater charge for the shorter haul to Chattanooga than is charged "*over the same line and in the same direction*" to Nashville.

Under the decree of the court requiring all the defendants, including the Louisville and Nashville road, to obey the order, that road as a member of, or because of its interest in, the line via Augusta, Atlanta, and Chattanooga to Nashville is subject to the order under section 4 of the law. The order, however, should be so modified as to make it embrace the line, composed in

part of the Louisville and Nashville road, *through Cincinnati* to Nashville, *thus enforcing the liability of the Louisville and Nashville road under section 3 of the law* for the undue preference it gives to Nashville over Chattanooga by both its lines, to wit, that via Cincinnati and that via Chattanooga.

This will defeat any attempt on the part of the Louisville and Nashville road to nullify the order of the Commission as it now stands by maintaining lower rates over the line via Cincinnati to Nashville than are charged to Chattanooga.

IF, HOWEVER, THE COURT SHOULD BE OF OPINION THAT IT CAN NOT SO MODIFY THE ORDER, THAT IS NO GROUND FOR NOT ENFORCING THE ORDER AS IT NOW STANDS AS TO THE LINES TO AND THROUGH CHATTANOOGA TO NASHVILLE.

(*See supplemental brief for appellee, pp. 8, 9.*)

We insist that we are correct in our proposition, that the language of this court in the Alabama Midland case, namely, that "the court is not restricted to a consideration merely of the power of the Commission *to make the particular order in question*, * * * and that the duty of the court is to decide, as a court of equity, *upon the entire body of the evidence*," would seem to imply or recognize power in the court to change or modify the order so as to adapt it to the ends of justice.

In addition to the authorities on this point cited in our original and supplemental briefs, we give the following extract from the opinion of Judge Jackson in Kentucky and I. Bridge Company *v.* Louisville and Nashville Railroad Company:

"The act to regulate commerce does not make the circuit court the mere executioner of the Commission's order or recommendation, so as to impose upon the court *a nonjudicial power.*"

(37 Fed. Rep., p. 907.)

The construction by counsel of the word "*premises*," as used in section 16 of the law, that it refers to the order of the Commission as made, is too narrow. *Hæret in cortice.*

In this connection we quote what is said on this point by Mr. Edmunds in his argument filed in this court in the Alabama Midland case:

"The words 'lawful order' mean an order the Commission has jurisdiction to make. An order may be lawful and at the same time erroneous, so that if the Commission made an order in a matter over which they had jurisdiction, which was merely an error of judgment as to precisely the degree of reparation, for instance, the carrier ought to make, the order would still be lawful. In such a case the court is to 'hear and determine the matter'—that is, the whole subject—'as a court of equity, * * * in such manner as to do justice in the premises'—that is, complete justice in the whole premises. 'Premises' is not merely the particular order that the Commission has made, but it is the

whole subject that had been duly brought before the Commission and on due notice and hearing had been acted upon. It is that duty which rested with the circuit court and is now imposed upon this court."
(168 U. S., p. 159.)

Certainly where a new party has come in or been brought in before the court which was not before the Commission, and whose liability was not disclosed to the Commission, the order may be modified by the court so as to meet this new condition and do complete justice.

O

L. A. Shaver

for appellee

Supreme Court of the United States.

No. 175.—October Term, 1900.

The East Tennessee, Virginia and Georgia Railway Company et al. vs. The Interstate Commerce Commission. } Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

[April 8, 1901.]

The Board of Trade of Chattanooga, Tennessee, a chartered corporation, petitioned the Interstate Commerce Commission for relief under the act to regulate commerce. The defendants, the East Tennessee, Virginia and Georgia Railway, and numerous other rail and steamship companies, were alleged to be common carriers subject to the act to regulate commerce, and engaged in the transportation of passengers and freight by all rail or partly by rail and water from Boston, New York, Philadelphia, Baltimore and other places on the Eastern seaboard to Chattanooga, Nashville, and Memphis in the State of Tennessee.

It was alleged that the defendants conveyed freight from the Eastern seaboard through and beyond Chattanooga to the cities of Nashville and Memphis for a lesser rate to such long distance points than was charged by them for like freight to Chattanooga, the shorter distance. This it was averred was a violation of section 4 of the act, prohibiting a greater charge for the shorter than for the longer haul, under substantially similar circumstances and conditions. And the disregard of the statute in the particular just stated, it was asserted, necessarily gave rise to violations of other provisions of the act to regulate commerce, viz., of section 1, which forbids unjust and unreasonable charges, and of section 3, making unlawful the giving of undue or unreasonable preferences.

It is unnecessary to consider the complaint of the lesser charge to Memphis, the longer, than to Chattanooga, the shorter, distance, since this grievance was in effect held by the commission to be without substantial merit; and its conclusion on this subject was not reviewed by either of the courts below, and it is not now seriously, if at all, questioned. After hearing, the commission made elaborate findings of fact, and stated the legal conclusions which were deduced therefrom. (4 Inters. Com. Rep. 213; 5 I. C. C. Rep. 546.) An order was made forbidding the defendant carriers from charging a greater compensation for the transportation for the shorter distance to Chattanooga than was demanded to Nashville, the longer, distance. The execution, however, of this order, was suspended until a date

named, so that the carriers might have opportunity to apply to the commission to be relieved from the operation of the order. No application to be exempted having been made, and the carriers not having conformed to the behests of the commission, this proceeding to compel obedience was commenced in the Circuit Court. In that court additional testimony was taken, but it was all merely cumulative of that which had been adduced before the commission. The Circuit Court, (85 Fed. Rep. 107,) whilst not approving the reasoning by which the commission had sustained the order by it entered, nevertheless on other grounds affirmed the command of the commission. The Circuit Court of Appeals for the Sixth Circuit, to which the case was taken, whilst it held that the commission had misapplied the law, and although it did not approve of the reasoning given by the Circuit Court for its decree, nevertheless affirmed the action of that court. (99 Fed. Rep. 52.)

Mr. Justice WHITE, after making the foregoing statement of the case, delivered the opinion of the Court.

To comprehend the contentions which are made on this record it is essential to give a summary of the condition as depicted in the findings of the commission, and upon which the relief which it granted was based.

The state of affairs was as follows: Freight from the Eastern seaboard to Cincinnati and other Western points, north of the Ohio River, was controlled by the classification and tariff of rates prevailing in what was denominated as the northern or Trunk Line territory. On the other hand, the area south of the Ohio River, which was denominated the southern territory, was governed by the classification and tariff of rates prevailing in that territory; such classification and tariff giving rise in most instances to a higher charge than that which prevailed in the northern territory. This general difference between the rates in the northern and those in the southern territory the commission found arose from inherent causes, and although they might in some aspects disadvantageously influence traffic in the southern territory, were yet the result of such essentially normal conditions as to give rise to no just cause of complaint. On this subject the commission said:

"There may be some disadvantage to Chattanooga from this circumstance, since an article of a given class under the first-named system may be in a lower class under the other system, but the injury, if any, resulting from differences of that character is not believed to be serious.

"The general range of rates in the territory covered by the Southern Railway and Steamship Association is materially higher than in the territory of the Trunk Line Association, the difference resulting mainly from the much greater volume of traffic in the latter section; and it is inevitable that difficulties should exist and complaints arise along the line of division between varying systems of classification and like methods of traffic construction."

The grievance alleged arose in this wise: Where freight destined to a point in the southern territory instead of being sent by the southern route was shipped from the Eastern seaboard, by the northern or trunk line, *via* Cincinnati or other trunk line points north of the Ohio River, it would be classified and charged for according to the northern trunk line rates. But such freight thus shipped through the trunk line or northern route bound for Chattanooga or other southern points on leaving Cincinnati and on entering the southern area, for the purpose of completing the transit, became subject to the southern classification and rates. Thus, irrespective of the mere form and considering the substance of things, the charge on freight shipped in this way was made according to the northern classification and rate for the transportation in the northern territory to points on the Ohio River, plus the southern classification and rates from those points to the place in the southern territory to which the freight was ultimately destined, this being equivalent to the rate which the merchandise would have borne had it been shipped so as to subject it wholly to the southern territory rates.

This was, however, not universally the case. The single exception (eliminating Memphis from view) was this: The Louisville and Nashville Railroad, operating from Cincinnati to Nashville, instead of causing the merchandise shipped from the Eastern seaboard through Cincinnati to Nashville to bear the southern territory classification and rate from Cincinnati to Nashville, submitted the traffic between Cincinnati and Nashville to the northern instead of to the southern territory rates. It hence followed that merchandise shipped from the Eastern seaboard to Nashville through the northern territory bore a less charge than it would have borne if shipped to Nashville through the southern territory.

To compete with the Louisville and Nashville Railroad for Nashville traffic, the carriers in the southern territory fixed their rate to Nashville so as to make it as low as that charged to that point by the Louisville and Nashville Railroad. It hence came to pass that freight shipped from the Eastern seaboard to Chattanooga paid the southern rate, whilst freight shipped to Nashville, although it passed through Chattanooga, went on to Nashville at the lower rate there prevailing, which lower rate was caused by the action of the Louisville and Nashville Railroad in exceptionally reducing its charge to Nashville. We say, by the action of the Louisville and Nashville Railroad, because the findings of the commission expressly establish that the exceptional rate to Nashville, which was established by the Louisville and Nashville Railroad, was not caused by water competition at Nashville, but was exclusively the result of the action of the Louisville and Nashville Railroad in exceptionally charging a lower rate to Nashville different from that which it demanded for traffic to other points through the southern territory That the other carriers through the

southern territory, including those operating from Chattanooga to Nashville, were, in consequence of this condition at Nashville, compelled either to adjust their rates to Nashville to meet the competition or abandon all freight traffic to Nashville, was found by the commission to be beyond dispute. On both these subjects the commission said:

"There might, of course, be such an advance in rail rates that shipments from the East would take the water route from Cincinnati. What amount of difference would produce that result it is impossible to determine from the testimony; but we find that such difference might be substantially greater than it is at present without important effect upon the railroad tonnage from the East, and that the through rate to Nashville is in no sense controlled by water competition at that point, either actually encountered or seriously apprehended.

* * * * * *

"The lower rates accepted by the carriers engaged in the transportation of Eastern merchandise to Nashville *via* Chattanooga are not forced upon them by any water competition at the former place. In performing this service for the compensation fixed by the present tariffs, these carriers are not affected by the circumstance that water communication exists between Cincinnati and Nashville. The Nashville rate is independent of the lines operating through Chattanooga, and those lines have no voice in determining its amount. That rate is made by the all-rail carriers *via* Cincinnati, and their action is uncontrolled by the defendant lines. The competition which the latter meet at Nashville is distinctly the competition of the trunk lines and the Louisville and Nashville system whose northern termini are at points on the Ohio River which receive trunk-line rates on Eastern shipments. The competitors of the defendants for this Nashville traffic, therefore, are the railroads from the Atlantic seaboard reaching Nashville by way of Cincinnati, &c., all of which are interstate carriers subject to the act to regulate commerce. These carriers established rates and united in joint tariffs from Eastern points to Nashville long before the lines through Chattanooga engaged in the Nashville business. Acceptance of the rates so fixed by the rail lines *via* Cincinnati was the necessary condition upon which the lines *via* Chattanooga could compete for Nashville traffic."

Although the commission thus found that the competitive conditions at Nashville rendered it absolutely necessary for the other roads to adjust their charges, so as to meet the competition, if they wished to engage in freight traffic to Nashville, it nevertheless held that the carriers had no lawful right to consider the competition at Nashville in adjusting their rates to that place. This was predicated solely upon the fact that the competition existing at Nashville was caused by carriers who were subject to the act to regulate commerce, and under the view which the commission entertained of the law to regulate commerce, competition of that character could not be availed of by a carrier as establishing substantially dissimilar circumstances and conditions, without a prior application by the carrier to the commission, for the purpose of obtaining its sanction to

taking such competitive conditions into consideration for the purpose of fixing rates to the competitive point. The commission, in support of this construction of the statute, referred to a previous opinion by it announced in the case of the *Georgia Railroad Commission* v. *Clyde Steamship Company et al.*, (4 Inters. Com. Rep. 120; 5 I. C. C. Rep. 324.) The proposition decided in the case cited, which it was held governed the case at bar, was thus stated:

"'The carrier has the right to judge in the first instance whether it is justified in making the greater charge for the shorter distance under the fourth section in all cases where the circumstances and conditions arise wholly upon its own line or through competition for the same traffic with carriers not subject to regulation under the act to regulate commerce. In other cases under the fourth section the circumstances and conditions are not presumptively dissimilar, and carriers must not charge less for the longer distance except upon the order of this commission.'"

Applying this proposition, the commission said:

"We must hold that the lower rates accorded by the defendants on shipments to Nashville are without warrant of law, and that the higher charges exacted on shipments to Chattanooga cannot be sanctioned in this proceeding."

The order entered by the commission was confined solely to the greater charge to Chattanooga, the shorter, than to Nashville, the longer, distance. Omitting mere recitals, it was adjudged that certain named defendants, "or such of them as are or may be engaged in the transportation of property from New York and other Atlantic seaboard points to Chattanooga or through Chattanooga to Nashville, in the State of Tennessee, be and they severally are hereby required to cease and desist from charging or receiving any greater compensation in the aggregate for the transportation of like kind of property from New York, Boston, Philadelphia, Baltimore, or other Atlantic seaboard cities, for the shorter distance to Chattanooga than for the longer distance over the same line in the same direction to Nashville. That for the purpose of enabling said defendants to apply to the commission for relief under the proviso clause of the fourth section of the act to regulate commerce, this order is hereby suspended until the first day of February, 1893; but the same will take effect and be in force from and after that date unless such application be made prior thereto. In case such relief shall be applied for within the time mentioned the question of further suspending this order until the hearing and determination of such application will be duly considered."

The record makes it clear that in allowing this order the commission thought that its literal enforcement would bring about an injustice, and therefore that the order was entered solely because it was deemed that the technical requirements of the statute must be complied with. It is also patent from the reasons given by the commission for allowing the order

that the commission refrained from considering or passing on any other question arising, either expressly or by implication, from the complaint, such as the reasonableness *per se* of the rates in controversy or the discrimination which might be produced by them. And it also obviously appears that the examination of the issues was thus confined solely to the alleged violation of the long and short haul clause, because it was deemed that all questions as to reasonableness of rates *per se* or discrimination arising therefrom could more properly be considered by the commission when application was made by the carriers to be relieved from the restraints of the long and short haul clause within the time and in accordance with the permission granted by the order which was rendered. The commission on these subjects said:

"In justice to the various parties in interest, however, it should be added that this disposition of the case is not intended to preclude the defendants from applying to the commission for relief from the restrictions imposed by the fourth section of the act, on the ground that the situation in which they are placed with reference to this Nashville traffic constitutes one of the 'special cases' to which the proviso clause of that section should be applied.

"It is stated in the foregoing findings that the present Nashville rate is prescribed by the rail lines reaching that point *via* Cincinnati, and that the defendant lines through Chattanooga have no voice or influence in determining its amount. These lines are under compulsion, therefore, to meet the rates which other carriers have established, or leave those carriers in undisturbed possession of the entire traffic. They have no alternative but to accept the measure of compensation dictated by independent rivals, or abandon the large percentage of Nashville business which they now secure. In addition to this, the geographical position of these two cities, the diverse character and divergent courses of the several groups of lines which connect them with the Atlantic seaboard, the varying systems of classifications by which they are severally affected, and the greater volume of traffic at the lower rates prevailing in the trunk-line territory, are existing conditions which govern, to some degree at least, the transportation in question. For these conditions the carriers complained of do not appear chiefly responsible, because the lower rate to Nashville is beyond their control, and the allowance of the same rate to the shorter-distance point might reduce their revenues below the limits of fair compensation. Without in any sense prejudging the case, we hold that the defendants may invoke its consideration in an appropriate proceeding.

"Any such intimation, however, should not be understood as covering an implied endorsement of the present disparity of rates as between Chattanooga and Nashville, for no such inference is intended. The suggestion here made goes no further than the propriety of an unprejudiced investigation when permission to deviate from the general rule of the statute is applied for by these carriers on account of the special circumstances by which they are surrounded. It seems improbable that the discrimination complained of can be made less oppressive by an increase in the Nashville rate, and on that assumption the only practical relief is a reduction in rates

to Chattanooga. We are aware of the difficulties attending a readjustment upon that basis, but we cannot regard them as insuperable.

* * * * * *

"We entertain little doubt, therefore, that equity between shipper and carrier requires some reduction in the rates now enforced on Chattanooga traffic from Atlantic points, and are convinced of the necessity for such a reduction to secure relative justice between that town and Nashville. We refrain from further statement of the reasons which have induced this conclusion, as the amount to which the Chattanooga rate should be reduced will not now be decided. If the carriers engaged in Nashville transportation through Chattanooga act upon the suggestion above made, and apply for relief from the restrictive rule laid down in the fourth section, the subject can be more fully considered in disposing of that application."

After reciting the fact that the case had been on both sides presented to the commission under the assumption that the rights of the parties could be adequately adjusted by determining only the controversy arising from the long and short haul clause of the act, the commission added:

"The questions which may arise if permission is sought to depart from the general rule relating to long and short hauls was not specially discussed. On this ground, also, it would seem suitable to allow opportunity for a futher hearing before fixing maximum rates on shipments to Chattanooga."

Taking into view the terms of the order and the reasons given by the commission for considering only one aspect of the controversy and excluding all others, it is obvious that that body construed the act to regulate commerce as meaning that, however controlling competition might be on rates to any given place, if it arose from the action of one or more carriers who were subject to the law to regulate commerce, the dissimilarity of circumstance and condition provided in the fourth section could not be produced by such competition unless the previous assent of the commission was given to the taking by the carrier of such competition into view in fixing rates to the competitive point. This in effect was to say that the dissimilarity of circumstance and condition prescribed in the law was not the criterion by which to determine the right of a carrier to charge a lesser rate for the longer than for the shorter distance unless the assent of the commission was asked and given. This in substance but decided that the dissimilarity of circumstances and conditions prescribed in the law was not the rule by which to determine the right of a carrier to charge a lesser rate for the longer than for the shorter distance, but that such right solely sprang from the assent of the commission. In other words, that the dissimilarity of circumstances and conditions became a factor only in consequence of an act of grace or of a discretion flowing from or exercised by the commission. This logical result of the construction of the statute adopted by the commission was well illustrated by the facts found by it and to which the theory announced was in this case applied. Thus, although the commission found as a fact that the competition at Nash-

ville was of such a preponderating nature that the carriers must either continue to charge a lesser rate for a longer haul to Nashville than was asked for the shorter haul to Chattanooga or to abandon all Nashville traffic, nevertheless they were forbidden to make the lesser charge for the longer haul. In other words, they were ordered to desist from all Nashville traffic, unless they applied to the commission for the privilege of continuing such traffic by obtaining its assent to meet the dominant rate prevailing at Nashville. But since the ruling of the commission was made in this case, it has been settled by this court that competition which is controlling on traffic and rates produces in and of itself the dissimilarity of circumstance and condition described in the statute, and that where this condition exists a carrier has a right of his own motion to take it into view in fixing rates to the competitive point. That is to say, that the dissimilarity of circumstance and condition pointed out by the statute which relieves from the long and short haul clause arises from the command of the statute and not from the assent of the commission; the law, and not the discretion of the commission, determining the rights of the parties. It follows that the construction affixed by the commission to the statute upon which its entire action was predicated was wrong. (*Texas & Pacific Railway Co.* v. *Interstate Commerce Commission*, 162 U. S. 197; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 164; *Louisville & Nashville Railroad Company* v. *Behlmer*, 175 U. S. 648, 654, 655.)

Although it thus appears that the commission erred in its construction of the statute, nevertheless it is insisted that the action of the commission should be affirmed. This contention is supported by propositions which are stated in argument in many different forms, but are really all reducible to the following summary:

Granting that the commission wrongfully held that the carriers had no right of their own motion to avail of the competition at Nashville as producing the dissimilarity of circumstance and condition provided in the statute, nevertheless the order made by the commission was right, because as there was a difference between the rate charged to Nashville and that exacted to Chattanooga, there necessarily resulted an undue preference in favor of Nashville and a discrimination against Chattanooga, falling within the inhibition of the third section of the act to regulate commerce. And, it is argued, even conceding this to be erroneous, as it was established by the proof that the Nashville rates were adequate, the Chattanooga rates were consequently unreasonably high, and hence were *per se* unreasonable. Assuming this proposition to be without foundation, it is insisted as Chattanooga was a point at which various railroads centered, it was therefore in a position where, if competition had been allowed full play, it would have a rate at least as low as that at Nashville; and as the proof showed that the higher rate prevailing at

Chattanooga was fixed by consent or agreement among the carriers, therefore Chattanooga by the effect of such agreement was deprived of the benefits of competition; the deduction being that the carriers who thus by agreement prevented the normal forces of competition from exerting their proper influence at Chattanooga, should not be allowed to avail of the competition at Nashville to charge a lesser rate to that point than they did to Chattanooga. Besides, it is urged that as it was shown that the lower rate at Nashville was caused by the conduct of the Louisville and Nashville Railroad in exceptionally making lower charges from Cincinnati to Nashville that road should not be permitted to give a preference to Nashville and then avail itself of the preference thus given to discriminate against Chattanooga, which would be the case if the difference of rates on freight passing through Chattanooga to Nashville were allowed to continue. This proposition being predicated on the assertion that it was established by proof that the line between Chattanooga and Nashville over which the traffic *via* the southern territory, passing through Chattanooga from the Atlantic seaboard, moved to Nashville was in legal effect to be considered the Louisville and Nashville Railroad, since that corporation was the owner of a majority of the stock of such line between Chattanooga and Nashville, and, therefore, in effect, controlled it.

Pausing for a moment to generally consider the foregoing contentions, it becomes manifest that in so far as they embody propositions of law, they concede the error of the legal construction applied by the commission and yet invoke a seemingly different construction by which the erroneous rule of the commission is to be in substance upheld. It is also clear that the propositions of fact which they embody cover the field of inquiry which the commission excluded from view, and which that body held could not be ascertained from the record before it, but must be developed from the new inquiry which it was proposed to make when leave to depart from the restrictions of the long and short haul clause was invoked by the carriers at the hands of the commission. Indeed, it is substantially accurate to say that the propositions of fact now asserted not only do this, but in effect are repugnant to the conclusions of fact found by the commission on the branch of the controversy to which the commission actually extended the inquiry by it made. It might well suffice to allow the result just stated to which the propositions necessarily lead to serve as a demonstration of their unsoundness. Inasmuch, however, as the legal contention embodied in the propositions were in substance adopted by the Circuit Court upon the assumption that its action in so doing was in accord with the decision of this court in the case of *Interstate Commerce Commission* v. *Alabama Midland Railway Co.*, (168 U. S. 144,) and as some of the propositions of fact received the sanction of the Circuit Court of Appeals and were made the basis of its decree enforcing the order of the

commission, we will proceed to analyze them to the extent necessary to determine our duty in relation to them.

Coming to do so, it is at once apparent that the contentions divide themselves into two classes, the first, a proposition of law involving the construction of the act to regulate commerce and the others embracing ultimate deductions from the facts proven. The legal proposition is this, that where in consequence of competitive conditions existing at a particular point, the dissimilarity of circumstance provided in the fourth section of the act arises, it cannot justify a carrier on his own motion in charging a lesser rate for the longer haul to the competitive point than is asked for the shorter haul to the non-competitive point, if in doing so a preference in favor of the competitive point arises or a discrimination against the non-competitive point is produced. That is to say, it is insisted that the provision as to substantially dissimilar circumstances and conditions of the fourth section and the commands of the third section as to discrimination and undue preference being found in the one statute must be construed together, so that the dissimilarity of circumstance and condition cannot be availed of if either discrimination or preference will arise from doing so. We quote the exact language in which this proposition as stated by counsel, reproducing the italics by which the import of the contention is emphasized:

"*Fifth.* That the injury or prejudice to Chattanooga, shown by the proof to be the effect of the discriminations practiced against Chattanooga and in favor of Nashville, *brings the case within the evil which the act to regulate commerce was designed to remedy, and that competition, no matter how forceful, should not be held to nullify the law itself—in other words, should not be held to justify the very wrongs which the law was enacted to remedy.*"

It is argued that this proposition is sustained by the opinions in the *Alabama Midland case*, (168 U. S. 164,) and in *Louisville & Nashville Railroad Co.* v. *Behlmer*, (175 U. S. 648,) in both of which cases, as we have seen, the right of the carrier to take into view on his own motion competition which substantially affected traffic and rates as the producing cause of dissimilarity of circumstance and condition was upheld.

The portion of the opinion relied upon in the Alabama Midland case is found on page 167, and is as follows:

"In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the question of 'undue or unreasonable preference or advantage,' or what are 'substantially similar circumstances and conditions.' The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the commission or the courts from taking that matter into consideration."

The expressions in the Behlmer case which are relied upon are found on page 674 of the opinion in that case, and are as follows:

"It follows that whilst the carrier may take into consideration the existence of competition as the producing cause of dissimilar circumstances and conditions, his right to do so is governed by the following principles: First. the absolute command of the statute that all rates shall be just and reasonable and that no undue discrimination be brought about, though, in the nature of things, this latter consideration may, in many cases, be involved in the determination of whether competition was such as created a substantial dissimilarity of condition; second, that the competition relied upon be not artificial or merely conjectural, but material and substantial, thereby operating on the question of traffic and rate making, the right in every event to be only enjoyed with a due regard to the interest of the public, after giving full weight to the benefits to be conferred on the place from whence the traffic moved as well as those to be derived by the locality to which it is to be delivered."

The reasoning which we have thus quoted in the opinions in question, it is insisted, maintains the doctrine that although competition of the character therein described may serve to engender dissimilarity of circumstance and condition which a carrier can avail of of its own motion, it does not necessarily do so. Whether it can be allowed to produce this effect, it is argued, must depend upon all the surrounding circumstances, such as the preference or discrimination which may arise from allowing it to be done and the degree to which the interests of the public may be injuriously affected by permitting it to do so. To support this view, it is argued, "that to hold otherwise would be placing Congress in the absurd position of laying down a rule and then providing that the rule should not be enforced in the only cases in which violations of the rule were known to exist. In other words, enacting a law and providing at the same time that it should be of no effect."

But in substance this reasoning only amounts to the assertion that the settled construction of the statute, by which it has been held that real and substantial competition gives rise to the dissimilarity of circumstance and condition, pointed out in the fourth section, is wrong, and should be overruled. The language of the opinions which is relied upon must be read in connection with its context, and must be construed by the light of the issue which was in controversy in the cases and which was decided; that is, the right of the carrier to take the competitive conditions into consideration as creating dissimilarity of circumstance and condition. The right of a carrier to do so could not have been sustained if the proposition now asserted had not necessarily been decided to be unsound. The summing up or grouping of the various provisions of the act which was made in the passages relied upon but served to point out that the provisions of the statute allowing competition to become the cause of dissimilarity of circumstance and condition could operate no injurious effect in view of the other pro-

visions of the act protecting against discrimination and preference; that is, the undue preference and unjust discrimination against which the other provisions of the statute were aimed. True it is that all of the provisions of the statute must be interpreted together, and because this is the elementary rule the argument now pressed upon our attention is unsound. If it were adopted, it would follow of necessity that competition could never create such a dissimilarity of circumstance and condition as would justify the lesser charge to the competitive point than was made to the non-competitive point. This would be the inevitable consequence, since under the view which the argument assumes it would be impossible for the lesser rate to prevail to the competitive point without creating a preference in favor of that point, and without giving rise to a discrimination against the non-competitive point to which the higher rate was asked. Thus the reasoning conduces to the deduction which it is advanced to refute; that is, the assumption that the statute at one and the same time expressly confers a right, and yet specifically destroys it. This is plainly the consequence flowing from the argument that competition, "however forceful" it may be, cannot produce dissimilarity of circumstance and condition if discrimination and preference is held to necessarily arise from the charging of the lesser rate to the longer distance competitive point.

It is not difficult to perceive the origin of the fallacy upon which the contention rests. It is found in blending the third and fourth sections in such a manner as necessarily to destroy one by the other instead of construing them so as to cause them to operate harmoniously. In a supposed case when, in the first instance, upon an issue as to a violation of the fourth section of the act, it is conceded or established that the rates charged to the shorter distance point are just and reasonable in and of themselves, and it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer distance point, it must result that a discrimination springing alone from a disparity in rates cannot be held, in legal effect, to be the voluntary act of the defendant carriers, and as a consequence the provisions of the third section of the act forbidding the making or giving of an undue or unreasonable preference or advantage will not apply. The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers. And special attention was directed to this view in the Behlmer case, in the passage which we have previously excerpted. To otherwise construe the statute would involve a departure from its plain language, and would be to confound cause with effect. For, if the preference occasioned in favor of a particular

place by competition there gives rise to the right to charge the lesser rate to that point, it cannot be that the availing of this right is the cause of the preference, and especially is this made clear in the case supposed, since it is manifest that forbidding the carrier to meet the competition would not remove the discrimination.

The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this court; that is, that competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and non-competitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the non-competitive point may apparently engender a discrimination against it. We say seemingly on the one hand and apparently on the other, because in the supposed cases the preference is not "undue" or the discrimination "unjust." This is clearly so, when it is considered that the lesser charge upon which both the assumption of preference and discrimination is predicated is sanctioned by the statute, which causes the competition to give rise to the right to make such lesser charge. Indeed, the findings of fact made by the commission in this case leave no room for the contention that either undue preference in favor of Nashville or unjust discrimination against Chattanooga arose merely from the act of the carriers in meeting the competition existing at Nashville. The commission found that if the defendant carriers had not adjusted their rates to meet the competitive condition at Nashville, the only consequence would have been to deflect the traffic at the reduced rates over other lines. From this it follows that, even although the defendant carriers had not taken the dissimilarity of circumstance and condition into view, and had continued their rates to Nashville just as if there had been no dissimilarity of circumstance and condition, the preference in favor of Nashville growing out of the conditions there existing would have remained in force and hence the discrimination which thereby arose against Chattanooga would have likewise continued to exist. In other words, both Nashville and Chattanooga would have been exactly in the same position if the long and short haul clause had not been brought into play.

That, as indicated in the previous opinions of this court, there may be cases where the carrier cannot be allowed to avail of the competitive condition because of the public interests and the other provisions of the statute, is of course clear. What particular environment may in every case produce this result cannot be in advance indicated. But the suggestion of an obvious case is not inappropriate. Take a case where the carrier cannot meet the competitive rate to a given point without trans-

porting the merchandise at less than the cost of transportation, and therefore without bringing about a deficiency, which would have to be met by increased charges upon other business. Clearly, in such a case, the engaging in such competitive traffic would both bring about an unjust discrimination and a disregard of the public interest, since a tendency towards unreasonable rates on other business would arise from the carriage of traffic at less than the cost of transportation to particular places. But no condition of this character is here in question. since the commission find as follows:

"There is a conceded margin of profit in the rates now in force to Nashville and Memphis, with reference to the additional expense incurred in carrying Eastern traffic to those destinations, but whether that margin affords reasonable compensation for the services thus rendered cannot be determined from the evidence."

And the fact thus established was not controverted either in the opinion of the Circuit Court or in that of the Circuit Court of Appeals, and is not now denied. Applying the principle to which we have adverted to the condition as above stated, it is apparent that if the carrier was prevented under the circumstances from meeting the competitive rate at Nashville, when it could be done at a margin of profit over the cost of transportation, it would produce the very discrimination which would spring from allowing the carrier to meet a competitive rate where the traffic must be carried at an actual loss. To compel the carriers to desist from all Nashville traffic under the circumstances stated would simply result in deflecting the traffic to Nashville to other routes, and thus entail upon the carriers who were inhibited from meeting the competition, although they could do so at a margin of profit, the loss which would arise from the disappearance of such business, without anywise benefiting the public.

The Circuit Court in enforcing the order of the commission did not seemingly adopt the full scope of the proposition which we have just considered, but applied it in a modified form. Thus, it concluded that although the charge of the lesser rate to the longer point, in some instances, might be justified by the dissimilarity of circumstance and condition arising from competition, and therefore would not *per se* necessarily produce a preference, it would do so if by comparison between the dissimilarity of circumstance and condition and the dissimilarity of charge it was found that the one was disproportionate to the other.

After referring to the previous rulings of the commission maintaining that competition by carriers subject to the act could not be taken into view by a carrier in fixing rates to the competitive points without the previous assent of the commission, the court (85 Fed. Rep. 117) quoted the following statement of the commission in an opinion announced on December 31, 1897:

"Since then, however, the Supreme Court of the United States, by its decision in the case, *Interstate Commerce Commission* v. *Alabama Midland Railway Company*, (decided Nov. 8, 1897,) 168 U. S. 144, has determined that this view of the law is erroneous, and that railway competition may create such dissimilar circumstances and conditions as exempt the carrier from an observance of the long and short haul provision. Under this interpretation of the law, as applied to the facts found in this case, we are of the opinion that the charging of the higher rate to the intermediate points, as set forth, is not obnoxious to the fourth section. The section declares that the carrier shall not make the higher charge to the nearer point under 'substantially similar circumstances and conditions.' If the conditions and circumstances are not substantially similar, then the section does not apply, and the carrier is not bound to regard it in the making of its tariffs."

The court thereupon said:

"Now, I do not understand that such a conclusion follows from that decision. On the contrary, I suppose that when a violation of the long and short haul provision is charged, competition is one of the elements which enter into the determination whether the conditions are similar, and if a dissimilarity is found, then the further question arises whether the dissimilarity is so great as to justify the discrimination which is complained of. The language of the act ought not to be tied up by such literal construction. If it were, then if it should be found that the dissimilarity of conditions is really in favor of the locality discriminated against, the provision would not apply, a result contrary to the manifest intent. In other words, my opinion is that the restraint of section 4 is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates, and that it is competent under that section to restrain the exaction of the greater charge for the shorter haul, although there may be a substantial dissimilarity of conditions, provided the dissimilarity is not so great as to justify the discrimination made. But the long and short haul clause is only one of the specific provisions employed for the general purpose of the act. The third section underlies the fourth and supplies the principles on which it rests; so that, if the literal construction referred to be put upon the fourth section, the case would still be exposed to the third section, which forbids undue preference to one locality or the subjection of another to any undue disadvantage."

But this reasoning, whilst it does not apparently wholly rest on the erroneous view which we have previously refuted, in substance but applies it. Indeed, it not only does this, but it more markedly destroys one provision of the statute by the other, since it in effect declares that the greater the competition at any given point the lesser power has this fact to produce the dissimilarity of circumstance and condition provided in the statute. That such is the conclusion to which the reasoning resolves itself must be the case, when it is considered that the more active competition is at a particular point the lesser the rate will be to that point, and the greater, therefore, the disparity between the charge to the competitive point than that made to the non-competitive one. The proposition then is this, that

the greater and more potential is the influence of competition on rates and traffic, the less will be its force to engender dissimilarity of circumstance and condition; that is to say, that the causes specified in the statute are to be allowed to produce their influence in inverse ratio to their strength and importance.

As the Circuit Court only affirmed the order of the commission, which directed the carriers to desist from charging a greater compensation for the shorter haul to Chatanooga than for the longer haul to Nashville, there is no room for the conclusion that it found affirmatively that independently of the charge to Nashville the rate to Chattanooga was *per se* unreasonable. For, of course, a decree which ordered the carriers to desist from charging a greater compensation for the lesser than for the longer haul, would be in no way responsive to the conclusion that the rate for the lesser distance was unreasonable in and of itself. Such a decree would in effect authorize the carrier to continue to charge at its election a rate which was in itself unreasonable to the shorter point. Indeed, it cannot be held that the order rested upon the unreasonableness *per se* of the rate to Chattanooga, without implying that the court directed and commanded the carrier to bring about a preference and discrimination by charging the same price for the carriage of traffic to Nashville, the much more distant point, than was exacted for the carriage to Chattanooga.

Coming then to the propositions of fact, we repeat that each and every one of them either involve considerations which were wholly excluded from view by the commission, under the construction of the statute which was applied, because it was deemed that they would present themselves for consideration when the carrier petitioned the commission to be relieved from the restrictions of the long and short haul clause, and moreover that these propositions of fact are not in harmony with the findings made by the commission on the particular subject which it passed on. That the propositions of fact referred to are amenable to the considerations we have just stated is indisputable, when it is considered that taken together they assert the existence of conditions which the commission decided could not be ascertained in the state of the record before it, but could only be arrived at by a further unprejudiced examination, which, under the view taken, it was unnecessary to make until a future time. And that the facts now relied on are irreconcilable with what was found by the commission on the subject which it passed on is likewise clear. Thus, the contention that the rate to Chattanooga is shown to have been absolutely fixed by agreement, and therefore to be abnormally high, is necessarily repugnant to the express finding of the commission that the rates in the southern territory, whilst originally the offspring of agreement, were also the result of the volume of business in that territory, and although they might give rise to some disadvantage, did not do so to the extent of

making the rates in and of themselves a just subject of complaint. So, also, the insistence that it is shown that Chattanooga by its position was entitled to at least an equality of rates with Nashville is repugnant to the finding of the commission, that whilst it was shown that some reduction would be just at Chattanooga, the degree of that reduction could not be determined without a further investigation embracing the relation of of Chattanooga to other points and without a careful readjustment of the rates to such point. Again, the assertion that the road from Chattanooga to Nashville growing out of the stock ownership was in legal effect the Louisville and Nashville Railroad, is necessarily antagonistic to the express finding of the commission, that the carriers through Chattanooga to Nashville were placed in a position where they must either meet the competition at Nashville or abandon all traffic to that point. The question which then arises is, shall this court now pass upon all the issues which the commission excluded from view, because of a mistake in law committed by that body, and in doing so not only overthrow the findings of fact made by the commission, but also adopt new findings antagonistic to those which the commission made, and this for the purpose, not of affirming the order entered by that body, but to enable us to reach a result which the commission itself declared could only be justly arrived at after a further and unprejudiced investigation by it of the situation which the controversy involves?

True, it is insisted that such original action is not required at our hands, because, it is asserted, the Circuit Court of Appeals considered and passed on the propositions relied upon, and the action of that court relieves this court from the duty of entering upon an original investigation of the whole evidence to determine the entire field of controversy.

It requires only, however, a brief reference to the opinion of the Circuit Court of Appeals to show that this contention is unfounded. In substance, that court stated in its opinion that it considered that the rates to Chattanooga, which was in the southern territory, had been fixed by agreement of the carriers as had been the other rates in that territory; that as Nashville, which was also in the southern territory, was given a low rate, because of the action of the Louisville and Nashville Railroad in exceptionally lowering its rates from Cincinnati to that point, the situation at Chattanooga entitled it to the same rates. The court, moreover, thought that the Louisville and Nashville Railroad, which owned the line from Cincinnati to Nashville, was in no position, as the owner of a majority of the stock in the road from Chattanooga to Nashville, to avail of the competition at Nashville as a basis for charging the lesser rate for the longer haul through Chattanooga to Nashville. It was besides concluded that where a rate to a particular point was the product of agreement, which stifled competition, such rate could not become the basis upon which to predicate the right of

a carrier to charge a lesser sum for the carriage of freight passing through that point to a more distant place, because of the competition at such more distant place. The court summed up its conclusions as follows (99 Fed. Rep. p. 63):

"We are pressed with the argument that to reduce the rates to Chattanooga will upset the whole southern schedule of rates, and create the greatest confusion; that for a decade Chattanooga has been grouped with towns to the south and west of her, shown in the diagram; and that her rates have been the key to the southern situation. The length of time which an abuse has continued does not justify it. It was because time had not corrected abuses of discrimination that the interstate commerce act was passed. The group in which Chattanooga is placed, shown by the diagram above, puts her on an equality in respect to eastern rates with towns and cities of much less size and business, and much further removed from the region of trunk-line rates, and with much fewer natural competitive advantages. If taking Chattanooga out of this group and putting it with Nashville requires a readjustment of rates in the south, this is no ground for refusing to do justice to Chattanooga. The truth is, that Chattanooga is too advantageously situated with respect to her railway connections to the north and east to be made the first city of importance to bear the heavier burden of southern rates, when Nashville, her natural competitor, is given northern rates. The line of division between northern and southern rates ought not to be drawn so as to put her to the south of it, if Nashville is to be put to the north of it. And we feel convinced from a close examination of the evidence that, but for the restriction of normal competition by the Southern Traffic Association, her situation would win for her certainly the same rates as Nashville. It may be that the difficulty of readjusting rates on a new basis is what has delayed justice to Chattanooga. It may well be so formidable as to furnish a motive for maintaining an old abuse."

The decree which was entered, however, did not declare the rates charged to Chattanooga to be unreasonable, but simply affirmed the order of the commission directing that no greater sum be charged for the carriage of freight to Chattanooga, the shorter, than was exacted to Nashville, the longer, distance. As we have already shown, such a decree is not responsive to the conclusion that the rates to Chattanooga were in and of themselves unreasonable, since the right to continue to exact them was sanctioned, provided the traffic to Nashville was either abandoned or the rate to Chattanooga made the same as to Nashville.

Without taking at all into view the legal propositions announced by the Circuit Court of Appeals in its opinion, and conceding, without passing upon such questions, that they were all correctly decided, it is plain that all the premises of fact upon which the propositions of law decided by the Circuit Court of Appeals rest are at variance with the propositions of fact found by the commission, in so far as that body passed upon the facts. From this it results that to decide the case in the aspect in which it is now presented we would be obliged to go into the whole evidence, as a matter of original impression, in order to determine the complex questions which

the case presents. Among those which of necessity would arise for decision would be whether the original agreement fixing rates to the southern territory, made long since and acted on consecutively for years, was of such a nature as to cause those rates to be illegal, although they might be found to be just and reasonable in and of themselves. If not, whether Chattanooga was from its situation properly embraced in the southern territory, and, if not, whether the Louisville and Nashville Railroad had violated the law by exceptionally reducing its rates to Nashville. If it had not, did it follow, because the condition at Nashville gave that city an exceptionally low rate, that Chattanooga was in a position to be entitled, as a matter of right, to as low or a lesser rate?

To state these issues is at once to demonstrate that their decision, as a matter of first impression, properly belonged to the commission, since upon that body the law has specially imposed the duty of considering them. Whilst the court has in the discharge of its duty been at times constrained to correct erroneous constructions which have been put by the commission upon the statute, it has steadily refused, because of the fact just stated, to assume to exert its original judgment on the facts, where, under the statute, it was entitled, before approaching the facts, to the aid which must necessarily be afforded by the previous enlightened judgment of the commission upon such subjects. This rule is aptly illustrated by the opinion in *Louisville & Nashville Railroad Co.* v. *Behlmer*, (1900) 175 U. S. 648, in which case, after pointing out the same error of construction adopted and applied by the commission in the present case, the court declined to undertake an original investigation of the facts, saying (p. 675):

"If, then, we were to undertake the duty of weighing the evidence in this record, we would be called upon, as a matter of original action, to investigate all these serious considerations which were shut out from view by the commission, and were not weighed by the Circuit Court of Appeals, because both the commission and the court erroneously construed the statute. But the law attributes *prima facie* effect to the findings of fact made by the commission, and that body, from the nature of its organization and the duties imposed upon it by the statute, is peculiarly competent to pass upon questions of fact of the character here arising. In *Texas & Pacific Railway* v. *Interstate Commerce Commission*, (*ubi supra*,) the court found the fact to be that the commission had failed to consider and give weight to the proof in the record, affecting the question before it, on a mistaken view taken by it of the law, and that on review of the action of the commission the Circuit Court of Appeals, whilst considering that the legal conclusion of the commission was wrong, nevertheless proceeded as a matter of original investigation to weigh the testimony and determine the facts flowing from it. The court said (p. 238):

'If the Circuit Court of Appeals was of opinion that the commission in making its order had misconceived the extent of its powers, and if the Circuit Court had erred in affirming the validity of an order made under such misconception, the duty of the Circuit Court of Appeals was to reverse

the decree, set aside the order and remand the cause to the commission in order that it might, if it saw fit, proceed therein according to law. The defendant was entitled to have its defense considered, in the first instance at least, by the commission upon a full consideration of all the circumstances and conditions upon which a legitimate order could be founded. The question whether certain charges were reasonable or otherwise, whether certain discriminations were due or undue, were questions of fact, to be passed upon by the commission in the light of all the facts duly alleged and supported by competent evidence, and it did not comport with the true scheme of the statute that the Circuit Court of Appeals should undertake, of its own motion, to find and pass upon such questions of fact in a case in the position in which the present one was.'

"We think these views should be applied in the case now under review."

The decree of the Circuit Court of Appeals should be reversed with costs and the case be remanded to the Circuit Court with instructions to set aside its decree adjudging that the order of the Commission be enforced, and to dismiss the application made for that purpose with costs the whole to be without prejudice to the right of the Commission to proceed upon the evidence already introduced before it or upon such further pleadings and evidence as it may allow to be made or introduced, to hear and determine the matter in controversy according to law.

And it is so ordered.

Mr. Justice HARLAN dissents.

True copy.

Test:

Clerk Supreme Court, U. S.